

March 30, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Daniel Elliott for a clerkship. Daniel was a student in my evidence class and law & social science class, and we have discussed legal and professional issues a number of times outside of class. In addition, I have read Daniel's writing sample and reviewed his overall academic record. Accordingly, I feel well-qualified to comment on Daniel's potential as a judicial clerk.

Daniel is smart, hard-working, personable, and mature. He will be able to handle any assignment you throw at him, and he will do the work quickly and well. Daniel was excellent in both of my classes; in fact, Daniel was consistently one of the best contributors in both classes, and he wrote a strong exam in evidence and strong papers in the law & social science class. One of the strongest assets Daniel will bring to the job is a real dedication to becoming a strong litigator, and a great interest in the law. Daniel has been participating in and coaching mock trial competitions for many years, and he has already demonstrated real skill as an advocate, winning the best oral advocate award as a 1L and advancing recently to the semi-finals of the William Minor Lile Moot Court Competition (the semi-finals will be held in the fall). Daniel plans on being a litigator, with the hope of eventually becoming an Assistant U.S. Attorney. In addition to doing all the things he needs to do to prepare for litigation, Daniel has been pursuing an M.A. in legal history, which is evidence of his work ethic and his love of the law. If you hire Daniel, you will get someone who wants to do the best job possible and who will put in the time and effort needed to make sure he does an excellent job for you.

Daniel will also be a great addition to your team. Daniel has a great sense of humor, he seems to get along with everyone, and he was very responsive to feedback given to him in the law & social science class—I'm sure the same will be true when he is clerking. He also seems to have limitless energy, as he has been involved in numerous extracurricular activities while at the law school.

I am pleased to recommend Daniel Elliott. I think he is a safe bet and will be someone you will be proud to have as an alumnus. Please do not hesitate to contact me if you have any questions.

Sincerely,

Gregory Mitchell

Greg Mitchell - greg.mitchell@law.virginia.edu - (434) 243-4088



**U. S. Department of Justice**

*United States Attorney  
Western District of Virginia*

*Christopher R. Kavanaugh  
United States Attorney*

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April 8, 2023

**Re: Recommendation of J. Daniel Elliott**

Dear Judge:

I recommend J. Daniel Elliott for a clerkship in your chambers. Daniel interned in our office from approximately mid-May 2022 to the end of July 2022, after completing his first year at the University of Virginia School of Law.

Daniel is smart, personable, and diligent. During part of his time in our office, I was preparing for a nine-defendant, two-week drug trafficking trial. Daniel joined our trial team and assisted with legal research, motions *in limine*, witness prep, and jury instructions. He also completed substantive assignments for other attorneys in the office.

Because we are located in Charlottesville, we fortunately receive high quality interns from UVA Law School each summer and semester. Daniel was no exception. However, what distinguishes Daniel are his non-legal, but equally important, skills and character. We are a small office; at the time of Daniel's internship, we were comprised of seven attorneys and three paralegals. Because of our size, we do not have a formal internship program. When an intern arrives on the first day, we walk them through some of our systems, and then, with no prior training, they start taking multiple assignments from different federal prosecutors working a variety of criminal investigations and cases. Daniel excelled in this environment. When accepting assignments, Daniel was engaged and asked questions, and never hesitated to seek additional guidance as his legal research or work product progressed. His temperament was perfect; even with suddenly shifting deadlines, Daniel remain unruffled, positive, and enthusiastic. He proactively sought additional work and observational opportunities. Daniel aptly balanced his caseload and met (if not consistently exceeded) his deadlines. He worked well with everyone in

the office, including support staff, and was an engaging and active participant at office social activities, where he exhibited an appropriate sense of humor and wit.

He will make a great addition to your chambers. Please do not hesitate to contact me with any questions.

Very truly yours,



Heather L. Carlton  
Assistant United States Attorney

April 10, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

Daniel Elliott has asked me to write a letter in support of his application for a position as law clerk in your Chambers. I am very pleased to do so.

Dan was a student in my Criminal Investigation class this past fall semester. The class was a fairly large one (65 students), but I became well-acquainted with Dan through his participation in the class discussions and our meetings during my office hours. In the classroom, I found Dan to be alert, engaged, and thoughtful; his interventions and questions were productive and concise, displaying his attention to the course readings and his sensitivity to the contextualized inquiries that are at the heart of so many Fourth and Fifth Amendment problems. Likewise, our conversations outside the classroom – whether during office hours or elsewhere – were productive and very interesting, as Dan always sought to reconcile seemingly disparate lines of cases and to predict where the Supreme Court might be heading next. It was an honor for me to teach Dan and to get to know him through these conversations. Based on his fine classroom discussions, I had high expectations for his work on our examination, and I'm delighted to report that he ably satisfied them. He earned a grade of A- on our exam; each of his essays was well written, well organized, and well supported; he saw the issues, quickly zeroed in on those that mattered most; he deployed the precedents mindfully; and he made wise predictions about the likely outcomes of questions that we had not discussed in class. Based on this performance, I am confident that he has the intellectual grit, work ethic, and analytical skills to backstop you in your important work.

When you take a look at Dan's law school transcript, you will see that he has earned distinguished grades in most of his courses and that his trajectory is upward. When we talked about his academic performance here, he confided that his first year was a bit difficult because he needed to devote substantial time to caring for his partner, who was suffering from a number of medical issues. Dan's ability to manage – really, to nurture – competing obligations is admirable, for it shows that he possesses a facility for work and for life, for satisfying a demanding professional schedule while honoring the human connections that he justly holds dear. Moreover, when you look at Dan's resume, you will see that, on top of his course work, he has fulfilled a whole array of professional activities, many of which serve the public interest communities at UVA and beyond. He's a distinguished oral advocate – I've got my fingers crossed that he'll keep advancing in our most prestigious moot court competition – and he serves on the Managing Boards of two academic law journals, namely, the Virginia Journal of International Law and the Virginia Journal of Criminal Law. His pro bono contributions to local justice initiatives are substantial and very meaningful. Perhaps most important – at least, in my eyes – he serves as a Legal Writing Fellow for our 1L Legal Research and Writing Program; in that capacity, he provides invaluable substantive, methodological, and stylistic guidance to members of the 1L class, and I know from his mentees that they rely on his advice, learn from his instruction, and treasure his friendship.

Before coming to law school, Dan worked for almost two years as a paralegal for the Organized Crime Drug Enforcement Task Force of the United States Attorney's Office for the Western District of Tennessee. Dan has shared with me some of the training and insight he gained in that position, and I predict that the experience will allow him to hit the ground running – really, sprinting – as a law clerk in a busy Chambers. As Dan puts it, he did that job during “pandemic conditions,” which made the work “more challenging than usual.” Dan plainly rose to that challenge – and more! – winning the 2020 Spirit of Excellence Award for his stellar work running a complicated COVID-19 response docket on top of the numerous “regular” duties performed by a paralegal in a hectic government office. In addition to gaining meaningful administrative and substantive skills, Dan found himself inspired to become an Assistant United States Attorney at some point in the near future, an aspiration that I predict that he will achieve and fulfill admirably.

In closing, I should mention that I am confident that you and your staff will enjoy Dan's presence in Chambers. His personality is open and attractive; he has made close friendships with his mates and his professors alike; his sense of humor is kindly and tactful. We are very fortunate that he chose to launch his career at this law school, and we are proud to call him one of our own. I predict that you and your staff will feel the same way about him, and I urge you to interview him in person, to see if he would be a good fit for you.

Please contact me by telephone or email if you have any questions or concerns about Dan, or if I can help on another front. I'm at your service.

Very truly yours,

Anne M. Coughlin  
Lewis F. Powell, Jr. Professor of Law  
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March 30, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Re: J. Daniel Elliott Clerkship Recommendation

Dear Judge Walker:

I write to recommend J. Daniel Elliott as a candidate for a clerkship in your chambers. Having taught Daniel in my legal writing course and supervised him as a teaching and research assistant, I'm convinced that he is a talented and hardworking legal thinker and writer who would make a terrific judicial clerk.

I taught Daniel in our school's year-long, first-year Legal Research and Writing course. Throughout the year, Daniel was consistently among the top three or four out of the nearly forty students in his section. On his final assignment of the fall semester—a complex memo requiring students to harmonize several lines of cases from other jurisdictions to analyze a contracts question of first impression—Daniel's work really shined. His memo walked the reader through the legal issues and relevant case law in a clear, organized way. Once again, his work was among the very best in his section, and he narrowly missed out on his section's Best Memo prize. Daniel continued his outstanding work in the spring. When it came time for him to present his mock appellate argument as part of the course, Daniel again excelled and won his section's prize for Best Oral Argument.

Because of his terrific writing skills, his ability to think deeply about legal issues, and his personable demeanor, I offered Daniel a prestigious position as a teaching assistant—a "Legal Writing Fellow," as they are known at our school—for this year's legal writing course. In that role, Daniel has worked with eleven first-year students, answering their questions and providing them with written and verbal feedback on their work. Through his experience evaluating and editing others' writing—both in terms of style and substance—Daniel has gained additional insight into the mechanics of good, clear writing. And from my perspective as a supervisor, Daniel has been an outstanding employee and a key part of our teaching team. Daniel has exhibited tremendous professionalism and maturity in his role. He has worked well with minimal supervision but has also been proactive about asking questions and raising important issues long before they became problems.

Daniel has also worked for me as a research assistant, looking into legal issues that could be used for future writing assignments. In particular, he has done some excellent work on case law interpreting and applying the Federal Sentencing Guidelines. Like his work as a Legal Writing Fellow, Daniel's been a model employee. He's performed extremely well with minimal supervision and has been quick to respond to new assignments or changes to existing ones. He is, without a doubt, the most diligent research assistant I've had in terms of keeping me apprised of where things stand on a given assignment and taking ownership of assignments—keeping an eye out for things I hadn't even considered. He's been excellent about checking in regularly to let me know where things stood on a larger project—without me having to remind or pester him about it.

Daniel's other activities outside of the classroom have also prepared him well for the role of a clerk. Even before starting law school, Daniel gained invaluable experience with federal law and procedure from his two years as a legal assistant with the U.S. Attorney's Office in Memphis. And during law school, Daniel has also taken advantage of opportunities to deepen his ability to think and write about the law. He has been incredibly active in moot court—including both intramural and extramural competitions—which has allowed him to practice writing about and arguing all sides of a given issue. His internship with the U.S. Attorney's Office in Charlottesville reinforced his previous professional experience, and his upcoming summer associate position with Venable will, no doubt, allow him to further enhance his research and writing skills.

In addition to his impressive academic and professional record and his strong writing abilities, Daniel is also a terrific person to be around. In all of my interactions with Daniel, he has been professional and well-prepared but also friendly, enthusiastic, and down-to-earth. I have no doubt he would bring these same positive personality traits to his role as a clerk.

My interactions with Daniel—both inside and outside of the classroom—have made clear that he is a talented and diligent aspiring attorney and a wonderful person to work with. In short, I believe Daniel would be a very valuable asset to your chambers. If I can provide any other information, please do not hesitate to contact me via phone (407.620.4882) or email (jfore@law.virginia.edu).

Sincerely,

Joe Fore - jfore@law.virginia.edu - 434-982-5507

Joe Fore

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Daniel Elliott Writing Sample:

The following is a response to a 28 U.S.C. § 2255 motion I drafted during my Summer 2022 internship with the US Attorney's Office in Charlottesville, VA. The defendant pleaded guilty without the benefit of an agreement to a single count of traveling in foreign commerce to engage in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(c). The defendant's 2255 motion raised ten separate grounds challenging his conviction and sentence. I include responses to a number of those arguments below, as the original response totaled 20 pages.

Throughout the drafting process, I conducted all research and writing to produce the work below. After that, I consulted with the attorney on the case, who proposed changes which are not included here. After those edits, that attorney took a final editing pass over the document before filing; those changes are similarly not included here. In accordance with office policy, I submitted my response for review by the ethics officers and determined it necessary to remove any case number or instances of the defendant's name from my response. Having done so, the document below is entirely my own work and is approved for distribution to potential employers as a writing sample.

### **Legal Argument**

Defendant raises ten arguments. These include four related to constitution challenges directed at the charging statute (grounds 1, 2, 4, and 10), one related to a constitutional challenge directed at his interviews with HSI (ground 3), three related to the constitutionality and sufficiency of his supervised release (grounds 5, 6, and 7), and two related to constitutional challenges directed against SORNA (grounds 8 and 9).

First, all challenges raised in Defendant's petition should have been raised on direct appeal and are thus subject to procedural default. Second, no ground raised by Defendant merits review in spite of the procedural default, and even if they did, each fails on the merits of their substance. Finally, this Court can and should dismiss the petition without the need for a hearing.

...

## **II. Defendant's Claims Do Not Constitute Error in His Proceedings and Did Not Cause Prejudice.**

Even if this Court does not find Defendant's claims to be procedurally defaulted, they are still without merit and do not constitute a miscarriage of justice in his case.

### **A. Section 2423(c) is constitutionally valid and Defendant's conduct falls squarely within the statute.**

Contrary to Defendant's challenges, courts have repeatedly upheld the statute under which he pleaded guilty (18 U.S.C. § 2423(c)), the statute requiring his registration as a sex offender, and have rejected similar claims of international law issues at Defendant raises here.

First, Defendant raises various challenges to the statute with which he was charged, 18 U.S.C. § 2423(c). These grounds include a factual impossibility argument (ground 1), arguments that Congress lacked authority to create the statute (ground 2), that the statute is unconstitutionally vague (ground 10), and that the statute as applied here violates the treaties of

the nation of Haiti (ground 4). *Id.*

*i. Section 2423 is a valid exercise of Congressional authority.*

Courts have routinely found 18 U.S.C. § 2423(c) to be a valid exercise of Congressional authority under the Foreign Commerce Clause. *See United States v. Bollinger*, 798 F.3d 201, 218 (4th Cir. 2015) (“Congress may also regulate an activity when it is rational to conclude that the activity has a demonstrable effect on foreign commerce. It is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry”); *United States v. Durham*, 902 F.3d 1180, 1215 (10th Cir. 2018) (“Here, the legislative history, the overall statutory scheme, and jurisdictional hook all evince that Congress had a rational basis for concluding that, in the aggregate, Americans who travel abroad and have noncommercial sex with minors substantially affect the international sex tourism market. Congress determined, after years of experience with the evolving legislative framework, that it needed § 2423(c) to complete the package. We cannot say this choice was unreasonable.”); *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (“No circuit court has declared § 2423(c) unconstitutional.”).

Defendant argues that his conviction cannot stand because there is no commercial sex industry in Haiti, and certainly not one targeting his victims, underage boys, thus meaning his non-commercial activity cannot be said to have an effect on a commercial sex industry and consequently robbing Congress of its Foreign Commerce Clause powers here. ECF No. 137 at 4-13. Defendant cites approvingly to *United States v. Bollinger* in the Fourth Circuit, which he says compels his success for lack of a commercial sex industry in Haiti. *Id.* That very case, however, concerns a defendant, a missionary no less, who moved to Haiti and, while there, engaged in illicit sexual conduct with minor girls. *Bollinger*, 798 F.3d at 203-04. Defendant’s own argument

defeats itself and should fail here.

...  
*iii. Section 2423 and prosecutions thereunder do not violate international  
 treaty obligations or rights.*

Finally, Defendant claims that prosecution under § 2423 of offenses which occur in Haiti violate the rights Haiti under a United Nations treaty aimed at eradicating child sexual abuse and exploitation. ECF No. 137 at 21-23. First, the laws and treaties of a foreign nation do not, on their own, limit the rights and powers of the United States Government to enact and enforce its own laws; to hold otherwise would affront the Supremacy Clause and the constitutional order of our federal system. *See, generally, Rainey v. United States*, 232 U.S. 310, 316 (1914) (holding that Congress is not bound by international law); *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003) (“United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both.”). Yet even assuming Defendant’s claim has any merit to begin with, the United States is also a party to the very treaty Defendant notes Haiti signed (which Defendant acknowledged). ECF No. 137 at 21. In fact, the statute under which Defendant pleaded guilty and was convicted is part of Congress’s attempt to execute the signed treaty. *See United States v. Park*, 938 F.3d 354, 358 (D.C. Cir. 2019) (“The provisions of the PROTECT Act that criminalize child sexual abuse and production of child pornography by U.S. citizens living abroad help to fulfill the United States’ responsibility under the Optional Protocol.”). If the UN Optional Protocol has any influence in this matter, it provides the United States with the same imperative to prosecute Defendant, as a United States citizen, as it could even theoretically provide any other nation. Nothing about Haiti’s treaty obligations hampers federal prosecution here, and Defendant’s final statutory claim must also fail.

B. Defendant's rights under the Fifth Amendment were not infringed.

Next, Defendant challenges the admissibility of statements he made during three interviews with law enforcement, decrying in ground 3 of his motion what he calls “deceptive” and “coercive” in violation of his Fifth Amendment rights. ECF No. 137 at 14-20. Defendant details the events of each of these three interviews, concluding that a totality of the circumstances test should be employed here to determine his will was overborne by police. *Id.* He concludes by requesting an evidentiary hearing to prove his claims and to demonstrate that his conviction was based on violations of the Fifth Amendment. *Id.* At every step of the argument, Defendant confuses the purpose of the § 2255 petition, ignores the reality of his own conviction, and misstates the law surrounding *United States v. Miranda*, 384 U.S. 436 (1966).

*i. Defendant waived his right to contest violations of the Fifth Amendment when he pleaded guilty.*

If this Court considers this claim beyond this threshold issue of procedural default, Defendant's claim fundamentally ignores the reality of his conviction. “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). The implications of that plea extend specifically to cases where the defendant seeks after plea to attack the constitutionality of questioning under *Miranda*. *See United States v. Molinuevo-Polanco*, 215 F.3d 1312 (1st Cir. 2000); *Washington v. Sobina*, 475 F.3d 162, 165 (3d Cir. 2007). Defendant was not sentenced to 276 months' incarceration as a result of a lengthy and contested trial wherein the jury convicted him, relying on confessions to law enforcement from these three interviews. Defendant pleaded guilty to his crime and acknowledged in a statement of facts that he was, in fact, guilty. ECF No. 38. Never were any

statements to law enforcement introduce in support of his conviction. In fact, as the transcript of the sentencing hearing in this matter makes clear, Defendant benefitted from the disclosure of his misdeeds to law enforcement, with both his counsel and the Court noting his willingness to ultimately confess to his crimes and pleaded guilty to the same as a reason not to sentence him above the guidelines range. Sentencing Hearing Transcript dated July 23, 2018, ECF No. 83 at 32, 59. Where the traditional remedy for the use of statements made in violation of *Miranda* is the suppression of those statements, there are no statements here to suppress. Defendant must by necessity have waived his right against self-incrimination under the Fifth Amendment when he pleaded guilty. *See Tollett*, 411 U.S. at 267. Nothing in this ground for relief can stand when considered in light of the procedural history which brings us here.

*ii. Defendant's Fifth Amendment rights were not violated.*

Finally, even if this Court decides to consider Defendant's Fifth Amendment claim on its merits, and even if this Court decides Defendant did not effectively waive his Fifth Amendment rights by his guilty plea, then Defendant is still wrong on the law and analysis which this Court must undertake to determine if a *Miranda* violation has occurred. "An individual is in custody for *Miranda* purposes when, under the totality of the circumstances, 'a suspect's freedom of action is curtailed to a "degree associated with formal arrest."'" *United States v. Parker*, 262 F.3d 415, 419 (4th Cir. 2001) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)). The Fourth Circuit has explained that test, saying, "We apply an objective inquiry to the issue of custody, asking 'whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.'" *United States v. Pressley*, 990 F.3d 383, 388 (4th Cir. 2021) (quoting *United States v. Hashime*, 734 F.3d 278, 282-83 (4th Cir. 2013) (citation, internal quotation marks, and alterations omitted)).

Even taking Defendant's recitation of facts on their face, the objective inquiry on the issue of custody would demonstrate Defendant was not in custody at the time of any of his interviews. By his own admission, the Homeland Security investigators with whom Defendant spoke told him he was "free to leave" throughout their interviews. ECF No. 137 at 17. They even provided him with a swipe card which allowed access out of the room wherein they spoke, ensuring he has access to terminate the interview at any time. *Id.* Defendant argues that his will was "overborne" by the promises investigators made to help his victims, saying they employed "moral coercion" to elicit his statements. *Id.* at 16. Yet when viewed objectively, the tactics of law enforcement used to advance their investigation with the cooperation of the defendant do not render the defendant in custody for the purposes of *Miranda*; in fact, at no time during any of these interviews would Defendant's *Miranda* rights have been implicated or attach. Simply put, Defendant's regret for having admitted to his crimes do not amount to a Fifth Amendment violation and certainly do not warrant relief under § 2255.

C. The Court imposed permissible terms of supervised release supported by the facts in the case.

Next, Defendant makes several claims against his supervised release for a term of life, including that supervised release under 18 U.S.C. § 3583(k) is unconstitutional under *United States v. Haymond*, 139 S. Ct. 2369 (2019) (ground 5), that various conditions of his supervised release are unconstitutional (ground 6), and that the conditions of his supervised release were not adequately explained by the Court during sentencing (ground 7). ECF No. 137 at 23-36. While these are, in fact, attacks on Defendant's sentence, they are baseless on their merits and must fail.

i. *The Court validly sentenced Defendant to a lifetime of supervised release.*

First, Defendant cites *United States v. Haymond* in support of his assertion that 18 U.S.C. § 3583(k), which provides for a mandatory minimum of five years' supervised release for

defendants convicted of violating, among others, 18 U.S.C. § 2423 and a statutory maximum supervised release term of life, is unconstitutional. Defendant misreads *Haymond*. That case did hold part of § 3583(k) unconstitutional; however, it did not hold unconstitutional the part of § 3583(k) that applies to Defendant or that authorizes his supervised release term.

18 U.S.C. § 3583(k) provides in full:

Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. § 3583(k)

In *Haymond*, the Supreme Court addressed the effect the final two sentences of that section, beginning with, “If a defendant . . .,” and continuing to the end of the paragraph. The Court found that the language of those final two sentences, mandating a minimum term of imprisonment following the revocation of supervised release (by judge at the preponderance of the evidence standard) instead of following a new trial (by jury at the beyond a reasonable doubt standard) violated the Fifth and Sixth Amendments. *Haymond*, 139 S. Ct. at 2373. Yet neither of those two sentences authorize the term of life supervised release for defendants convicted of violating 18 U.S.C. § 2423. Indeed, nothing in *Haymond* rejects as unconstitutional the whole of supervised release, nor does any case do hold. Defendant is wrong on the law, and his claim here must fail.

...

D. Defendant is properly subject to SORNA requirements.

Finally, Defendant challenges the constitutionality of the Sex Offenders Registration and Notification Act (“SORNA”), both because it is an exchange of liberty (ground 8) and because it is impossible for him to comply while incarcerated (ground 9). ECF No. 137 at 36-40. As with this challenge to the constitutionality of the statute under which he was charged and pleaded guilty, Defendant’s claims here are not properly raised in a § 2255 petition. Yet assuming this Court hears Defendant on the merits of these claims, they too fail.

First, the constitutionality of SORNA has been routinely upheld. The Supreme Court has upheld the Act. *See United States v. Kebodeaux*, 570 U.S. 387, 389 (2013) (“We conclude that the Necessary and Proper Clause grants Congress adequate power to enact SORNA and to apply it here.”). The Fourth Circuit has upheld it against nondelegation (see *United States v. Burns*, 418 F. App’x 209 (4th Cir. 2011)) and *Ex Post Facto* Clause arguments (see *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020)). Defendant cites no case supporting the idea that SORNA is unconstitutional, instead citing varied sources to claim that his rights are inalienable and thus SORNA must be unconstitutional. Yet, as Defendant well knows, rights can be given up and can be taken in the course of criminal prosecution. Defendant himself gave up his constitutionally guaranteed right to a trial when he pleaded guilty to the instant offense of sexually abusing a minor child while residing in a foreign place. That plea also meant that Defendant’s right to possess a firearm was taken, as a felon cannot lawfully possess a firearm under federal law. That SORNA requires what Defendant’s describes as a giving up of rights or an exchange of liberty does not render it unconstitutional; it makes SORNA the consequence of unlawful sexual activity against minors.

Defendant’s final ground for relief is the idea that he cannot register under SORNA

before release from prison, but that SORNA requires his registration prior to that event. ECF No. 137 at 39-40. Yet in his own motion, Defendant explains that the statute provides for a Bureau of Prisons official to ensure he is registered “shortly before his release.” ECF No. 137 at 39, quoting 34 U.S.C. § 20919(a). Defendant’s argument defeats himself. By statute, the BOP will ensure Defendant is registered before his release; where the BOP Inmate Locator predicts a release date nearly 15 years away from now, it is safe to say there is still plenty of time for Defendant to comply with SORNA in such a way that renders his argument of impossibility to comply meritless.<sup>1</sup>

...  
**Conclusion**

This case involves the “heinous crime” of “grooming,” “scheming and planning” to sexually assault “quite a large number of victims” across several years, something which concerned this Court because

“Mr. [Defendant] molested the most vulnerable children. It's one of the most serious offenses. . . . [H]e gained the trust of these children and their parents through his religious affiliations, through his friendships. He knew the boys were fascinated with him. He brought movies with him, as he said, and fun to their communities; and he abused that trust that was placed in him.”

Sentencing Transcript, ECF No. 83 at 57.

Defendant’s motion, which presents without merit numerous grounds to escape his sentence, should and ought to fail. Accordingly, the United States, by counsel, respectfully requests this Court dismiss the defendant’s petition to vacate his sentence.

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<sup>1</sup> [https://www.bop.gov/mobile/find\\_inmate/byname.jsp#inmate\\_results](https://www.bop.gov/mobile/find_inmate/byname.jsp#inmate_results), last accessed June 22, 2022.

**Applicant Details**

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 Middle Initial **H**  
 Last Name **Ellis**  
 Citizenship Status **U. S. Citizen**  
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**Applicant Education**

BA/BS From **New York University**  
 Date of BA/BS **May 2018**  
 JD/LLB From **New York University School of Law**  
<https://www.law.nyu.edu>  
 Date of JD/LLB **May 18, 2022**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Journal of Legislation and Public Policy**  
 Moot Court Experience **No**

**Bar Admission**

Admission(s) **New York**

**Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

### **Specialized Work Experience**

### **Recommenders**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**RAYNE H. ELLIS**  
88 Lexington Avenue  
NY, NY 10016  
(478) 335-8718  
rayne.ellis@law.nyu.edu

Honorable Jamar K. Walker  
Walter E. Hoffman  
United States Courthouse  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers starting during the term of 2024, or any subsequent term. I graduated from New York University School of Law in May of 2022 and have joined Arnold & Porter as an associate on their litigation team with a focus on products liability. Additionally, I was born in Virginia, and I am particularly interested in returning to my home state to clerk.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample is a Note that I wrote for Professor Jeremy Waldron's Human Dignity course examining criminal justice reform through a dignitarian lens.

Arriving separately are three letters of recommendations from the following NYU Professors: Erin Murphy (erin.murphy@nyu.edu), for whom I worked as a teaching assistant; Jeremy Waldron (jeremy.waldron@nyu.edu), my Note supervisor; and my Brennan Center Clinic seminar professor Yuriy Rudensky ([rudenskyy@brennan.law.nyu.edu](mailto:rudenskyy@brennan.law.nyu.edu)), in collaboration with my fieldwork supervisor Gowri Ramachandran (ramachandrang@brennan.law.nyu.edu).

If there is any other information that would be helpful to you, please let me know. I would welcome the opportunity to interview with you and look forward to hearing from you soon. Thank you for your consideration.

Respectfully,

Rayne H. Ellis

**RAYNE H. ELLIS**

88 Lexington Avenue, #504  
New York, New York 10016  
(478) 335-8718 • rayne.ellis@law.nyu.edu

**EDUCATION**

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, New York  
JD, May 2022

Honors: Dean's Scholar (*merit-based scholarship*)  
Staff Editor, *Journal of Legislation and Public Policy*  
Activities: Black Allied Law Student Association  
Brennan Center Public Policy Advocacy Clinic (Fall 2020)  
Criminal Law Teaching Assistant, Professor Erin Murphy (Fall 2020)  
Regulatory Policy Clinic (Fall 2021)

**NEW YORK UNIVERSITY**, New York, New York  
B.A. in Journalism and Psychology, May 2018

Honors: President's Honor Roll  
Arthur Ashe, Jr. Award (x2)  
UAA All-Academic Award (x3)  
Activities: Varsity Volleyball Team, Four-Year Starting Middle and Captain  
Student Athlete Advisory Committee, Co-President  
Special Olympics Volleyball Coach

**EXPERIENCE**

**ARNOLD & PORTER**, New York, New York

*Associate*, Fall 2022; *Summer Associate*, May 2021–July 2021

Drafted memoranda concerning Title IX notice and grievance procedures, the authority Members of Congress have over seating their own members, and CERCLA “owner” liability. Edited and added to an American Bar Association chapter on civil sanctions against domestic terrorists. Attended a deposition and organized key takeaways for attorneys.

**RICHMAN LAW & POLICY**, New York, New York

*Summer Associate*, June 2020–August 2020, January 2021–April 2021

Researched and drafted discovery motions, complaints, and legal memoranda regarding false statements made by companies about animal welfare, human rights, and environmental commitments. Led client meetings and worked closely with attorneys on settlement negotiations.

**ARITZIA**, New York, New York

*Fitting Room Manager*, November 2018–July 2019

Developed high-level clientele and generated sales as a styling go-to for this boutique retail store. Worked in tandem with the store manager to curate the shopping experience for clients. Engaged staff in styling, development, and training. Promoted to Fitting Room Manager after two months of styling experience.

**MASHABLE**, New York, New York

*Science Editorial Fellow*, May 2018–November 2018

Authored feature length articles on an array of topics including climate change, technology's impact on the environment, and on global warming's effects on humans, with a specific emphasis on mitigating future crises. Represented Mashable at important events, such as the Global Citizens Festival.

**ADDITIONAL INFORMATION**

Admitted to New York State Bar. Proficient in Spanish. Additional employment experience as an editorial fellow at Delish Magazine, and an editorial intern at Psychology Today, V Magazine, Complex Magazine, and Elite Daily. Conducted research for the Center on Race, Inequality, and the Law at NYU Law. Refurbished a library for a domestic violence survivors' shelter in Georgia. Enjoy historical dramas, long-distance running, and the ballet.

Name: Rayne H Ellis  
 Print Date: 06/01/2022  
 Student ID: N14534829  
 Institution ID: 002785  
 Page: 1 of 2



OFFICE OF THE UNIVERSITY REGISTRAR  
 School of Law  
 FICE School Code: 002785

Instructor: Ashley Binetti Armstrong  
 Financial Concepts for Lawyers LAW-LW 12722 0.0 CR

Send To: RAYNE HAEELI ELLIS

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

**New York University  
 Beginning of School of Law Record**

**Degrees Awarded**

Bachelor of Arts 05/16/2018  
 College of Arts and Science  
 Major: Journalism  
 Major: Psychology  
 Minor: Politics  
 Juris Doctor 05/18/2022  
 School of Law  
 Major: Law

**Fall 2019**

School of Law  
 Juris Doctor  
 Major: Law  
 Lawyering (Year) LAW-LW 10687 2.5 CR  
 Instructor: Rachel Wechsler  
 Torts LAW-LW 11275 4.0 B  
 Instructor: Mark A Geistfeld  
 Procedure LAW-LW 11650 5.0 B  
 Instructor: Samuel Issacharoff  
 Contracts LAW-LW 11672 4.0 B  
 Instructor: Richard Rexford Wayne Brooks  
 1L Reading Group LAW-LW 12339 0.0 CR  
 Topic: Refugee Beyond Reach  
 Instructor: Ashley Binetti Armstrong

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

**Spring 2020**

School of Law  
 Juris Doctor  
 Major: Law  
 Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.  
 Lawyering (Year) LAW-LW 10687 2.5 CR  
 Instructor: Rachel Wechsler  
 Legislation and the Regulatory State LAW-LW 10925 4.0 CR  
 Instructor: Adam M Samaha  
 Criminal Law LAW-LW 11147 4.0 CR  
 Instructor: Erin Murphy  
 International Law LAW-LW 11577 4.0 CR  
 Instructor: Jose E Alvarez  
 1L Reading Group LAW-LW 12339 0.0 CR  
 Topic: Refugee Beyond Reach

**Fall 2020**

School of Law  
 Juris Doctor  
 Major: Law  
 Brennan Center Public Policy Advocacy Clinic LAW-LW 10328 3.0 A  
 Instructor: Yuri Rudensky  
 Brennan Center Public Policy Advocacy Clinic Seminar LAW-LW 10353 2.0 A  
 Instructor: Yuri Rudensky  
 Professional Responsibility and the Regulation of Lawyers LAW-LW 11479 2.0 A  
 Instructor: Nathan Maxwell Crystal  
 Teaching Assistant LAW-LW 11608 2.0 CR  
 Instructor: Erin Murphy  
 Immigration Law & Rights of Non Citizens LAW-LW 11610 4.0 B  
 Instructor: Adam B Cox

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

**Spring 2021**

School of Law  
 Juris Doctor  
 Major: Law  
 Evidence LAW-LW 11607 4.0 CR  
 Instructor: Erin Murphy  
 Constitutional Law LAW-LW 11702 4.0 B  
 Instructor: David A J Richards  
 Human Dignity Seminar LAW-LW 11797 2.0 A  
 Instructor: Jeremy J Waldron  
 Human Dignity Seminar Writing Credit LAW-LW 11897 1.0 A  
 Instructor: Jeremy J Waldron  
 The Elements of Criminal Justice Seminar LAW-LW 12632 2.0 A  
 Instructor: Preet Bharara

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

**Fall 2021**

School of Law  
 Juris Doctor  
 Major: Law  
 Regulatory Policy Clinic Seminar LAW-LW 10105 2.0 A  
 Instructor: Richard L Revesz

**RAISED SEAL NOT REQUIRED**

This official university transcript is printed on secured paper and does not require a raised seal. An official signature in white ink and is imposed upon the institutional seal.

Elizabeth Kienle-Granzo  
 University Registrar  
 www.nyu.edu/registrar

**ACADEMIC  
 TRANSCRIPT**

**Name:** Rayne H Ellis  
**Print Date:** 06/01/2022  
**Student ID:** N14534829  
**Institution ID:** 002785  
**Page:** 2 of 2



OFFICE OF THE UNIVERSITY REGISTRAR  
 School of Law  
 FICE School Code: 002785

Max R Sarinsky  
 Journal of Legislation and Public Policy  
 Regulatory Policy Clinic  
 Instructor: Richard L Revesz  
 Max R Sarinsky  
 Property  
 Instructor: Daniel Hulsebosch  
 Federal Indian Law  
 Instructor: Joel West Williams  
 After the 2020 Election: the Paths and  
 Challenges of Political Reform Seminar  
 Instructor: Robert Bauer

LAW-LW 10621 1.0 CR  
 LAW-LW 11029 3.0 A-  
 LAW-LW 11783 4.0 B  
 LAW-LW 12367 2.0 B  
 LAW-LW 12398 2.0 A-

**AHRS** **EHRS**  
 Current 14.0 14.0  
 Cumulative 70.0 70.0

**Spring 2022**

School of Law  
 Juris Doctor  
 Major: Law  
 Complex Litigation  
 Instructor: Samuel Issacharoff  
 Arthur R Miller  
 Environmental Justice  
 Instructor: Sara E. Imperiale  
 Yukyan Lam  
 Torts:Products Liability  
 Instructor: Mark A Geistfeld  
 Federal Courts and the Federal System  
 Instructor: Helen Herschkoff

LAW-LW 10058 4.0 B+  
 LAW-LW 10424 2.0 A-  
 LAW-LW 11140 3.0 B+  
 LAW-LW 11722 4.0 B+

**AHRS** **EHRS**  
 Current 13.0 13.0  
 Cumulative 83.0 83.0

Staff Editor - Journal of Legislation & Public Policy 2020-2021  
 Notes Editor - Journal of Legislation & Public Policy 2021-2022

**End of School of Law Record**

**RAISED SEAL NOT REQUIRED**

This official university transcript is printed on secured paper and does not require a raised seal. An official signature in white ink and is imposed upon the institutional seal.

Elizabeth Kienle-Granzo  
 University Registrar  
 www.nyu.edu/registrar

**ACADEMIC  
 TRANSCRIPT**

Name: Rayne H Ellis  
 Birthdate (MM/DD): 06/04  
 Print Date: 12/18/2018  
 Student ID: N14534829  
 Institution ID: 002785  
 Page: 1 of 2

New York University  
 Beginning of Undergraduate Record

Degrees Awarded

Bachelor of Arts 05/16/2018  
 College of Arts and Science  
 Cum GPA: 3.491  
 Major: Journalism  
 Major: Psychology  
 Minor: Politics

Test Credits

Test Credits Applied Toward Fall 2014

Test	Component	Units
ADV_PL	Psychology	4.0
ADV_PL	World History	4.0
Test Totals:		8.0

Fall 2014

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Undecided			
Children & The Media	CAMS-UA 150-001	4.0	B+
Freshman Cohort Meeting	COHRT-UA 10-018	0.0	P
Texts & Ideas:	CORE-UA 400-001	4.0	B+
Utopias and Dystopias			
Language and Mind	LING-UA 3-001	4.0	C
Intermediate Spanish I	SPAN-UA 3-003	4.0	A-

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	49.200	3.075
Cumulative	16.0	24.0	16.0	49.200	3.075

Spring 2015

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Undecided			
Freshman Cohort Meeting	COHRT-UA 10-018	0.0	P
Writing The Essay:	EXPOS-UA 1-020	4.0	B
History of Disbelief	FRSEM-UA 548-001	4.0	A
Investigating Journalism	JOUR-UA 501-001	4.0	B+
Social Psychology	PSYCH-UA 32-001	4.0	B+

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	54.400	3.400
Cumulative	32.0	40.0	32.0	103.600	3.238

Fall 2015

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Journalism			
Human Evolution	ANTH-UA 2-001	4.0	B-
Journalism Ethics & First Amendment Law	JOUR-UA 502-001	4.0	B
Statistics for The Behavioral Sciences	PSYCH-UA 10-007	4.0	A-
Intermediate Spanish II	SPAN-UA 4-005	4.0	A-

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	52.400	3.275
Cumulative	48.0	56.0	48.0	156.000	3.250

Spring 2016

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Journalism			
Major: Psychology			
Cultures & Contexts: Indigenous North America	CORE-UA 519-001	4.0	A
Journalistic Inquiry	JOUR-UA 101-004	4.0	A-
Advanced Individualized Studies	JOUR-UA 997-001	4.0	A
Developmental Psychology	PSYCH-UA 34-001	4.0	B+

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	60.000	3.750
Cumulative	64.0	72.0	64.0	216.000	3.375

Fall 2016

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Journalism			
Major: Psychology			
Physical Science: Energy & The Environment	CORE-UA 203-001	4.0	B+
Reporting: Multimedia	JOUR-UA 102-001	4.0	A
Personality	PSYCH-UA 30-001	4.0	B+
Abnormal Psychology	PSYCH-UA 51-001	4.0	A-

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	57.200	3.575
Cumulative	80.0	88.0	80.0	273.200	3.415

Spring 2017

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Journalism			
Major: Psychology			
Expressive Cult: Images	CORE-UA 720-001	4.0	B+
The Beat:	JOUR-UA 201-001	4.0	B+
Covering Millennials			
Journalism as Lit:	JOUR-UA 504-001	4.0	A
History and the Novel			
Internship	JOUR-UA 980-001	2.0	P
Cognitive Neuroscience	PSYCH-UA 25-001	4.0	B

	AHRS	EHRS	QHRS	QPTS	GPA
Current	18.0	18.0	16.0	54.400	3.400
Cumulative	98.0	106.0	96.0	327.600	3.413

Fall 2017

Course	Section	Units	Grade
College of Arts and Science			
Bachelor of Arts			
Major: Journalism			
Major: Psychology			
Minor: Politics			
Adv Reporting:	JOUR-UA 301-002	4.0	A
Data Journalism			
American Constitution	POL-UA 330-001	4.0	A-
U.S. Foreign Policy	POL-UA 710-001	4.0	A-
Lab in Psychopathology	PSYCH-UA 48-002	4.0	A

	AHRS	EHRS	QHRS	QPTS	GPA
Current	16.0	16.0	16.0	61.600	3.850
Cumulative	114.0	122.0	112.0	389.200	3.475

Name: Rayne H Ellis  
Birthdate (MM/DD): 06/04  
Print Date: 12/18/2018  
Student ID: N14534829  
Institution ID: 002785  
Page: 2 of 2

Spring 2018

College of Arts and Science  
Bachelor of Arts  
Major: Journalism  
Major: Psychology  
Minor: Politics

Methods and Practice:	JOUR-UA 202-003	4.0	A-
Writing Journalism			
Internship	JOUR-UA 980-001	1.0	P
Gender in Law	POL-UA 336-001	4.0	B
International Human Rights	POL-UA 750-001	4.0	A-
Topics:	POL-UA 994-001	4.0	A
Law & Morality in the Age of Terror			

	<u>AHRS</u>	<u>EHRS</u>	<u>QHRS</u>	<u>QPTS</u>	<u>GPA</u>
Current	17.0	17.0	16.0	57.600	3.600
Cumulative	131.0	139.0	128.0	446.800	3.491

Term Honor: Dean's List for Academic Year  
End of Undergraduate Record

Unofficial



**New York University**  
*A private university in the public service*

School of Law

40 Washington Square South, Room 424  
New York, New York 10012-1099  
Telephone: (212) 998-6573  
Facsimile: (212) 995-4526  
Email: [jeremy.waldron@nyu.edu](mailto:jeremy.waldron@nyu.edu)

**Jeremy Waldron**  
*University Professor, NYU*

February 7, 2023

Dear Judge

A student of mine at NYU, Ms. Rayne Ellis, is applying for a clerkship in your chambers. She has asked me to write in support of her application. I am very happy to do so.

I know Ms. Ellis as a student in my HUMAN DIGNITY seminar in Spring 2021. This was a demanding seminar, combining a lot of theoretical reading with case law from a number of foreign countries as well as the United States.

Ms. Ellis was a steady and thoughtful presence in the class, making fine contributions both in discussion and in the weekly memos she submitted. She was consistent in her ability to bring up original insights that were always on point for the topic we were addressing. Some of the students took the opportunity of their “Human Dignity” memos to engage in esoteric speculation about distant ethical matters. Ms. Ellis, by contrast, was always able to advance the core discussion with her thoughts, and bring us back to each topic’s center of gravity. This made her an intellectual leader in the class, and it was much appreciated.

Ms. Ellis’s final paper for the seminar was on the topic of the place of dignity in judicial reasoning about the criminal justice system. It was a theoretically informed but pragmatically structured discussion. I was particularly taken by Ms. Ellis’s account of the small changes that might be

made to begin restoring the humanity of those who are caught in the crosshairs of the criminal justice system. In her plea for modest reforms, she wrote:

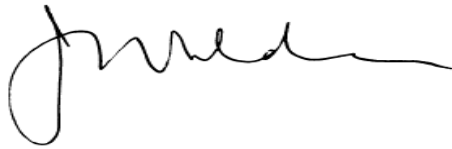
Perfect recognition of human dignity is not defined, therefore perfection in reform is not attainable. Most can recognize certain behaviors as blatantly disrespectful to our shared humanity. We have an obligation to alleviate the suffering of those being violated. Modest reform efforts must demand our immediate attention.

Ms. Ellis received a grade of A for the seminar.

I have not had much to do with Ms. Ellis apart from our *Human Dignity* discussions. You will see from her resume that her grades have improved since her first semester-with six straight A's in 2020-21

I believe she will make a very fine clerk. She is passionate about issues of racial justice and, in my view, she has the ability and intellectual discipline to match that passion. She will grace any chambers lucky enough to secure her services. I am happy to pass on my very strong recommendation for this candidate.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Waldron', with a long horizontal flourish extending to the right.

Jeremy Waldron  
University Professor and Professor of Law, NYU

Erin E. Murphy  
Norman Dorsen Professor of Civil Liberties  
New York University School of Law  
40 Washington Square South, Room 419  
New York, NY 10012  
(212) 998-6672  
erin.murphy@nyu.edu

March 27, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with utmost enthusiasm that I write to give Rayne Ellis my enthusiastic recommendation for a clerkship in your chambers. I met Rayne in Spring of 2020 (when the world came to a stop), hired her to serve as a teaching assistant in Fall of 2020 (during what turned out to be the most challenging semester in my 15 years of teaching), and had the pleasure of teaching her again under more normal circumstances in Spring of 2021. In every circumstance, she shined.

Rayne was one of 90-plus 1Ls in my criminal law class in the Spring of 2020, which mid-semester turned into a criminal law Zoom. To say it was a challenging time is of course an understatement. We were in New York City, the epicenter of the first bout of what we now all know became the Covid-19 pandemic. Almost overnight, faculty, staff, and students were confronting rampant actual infections, and equally terrifying fear of infection. Our 1Ls were suddenly packing up to head home or endeavoring to set up remote learning. It was not an easy time to teach or to learn.

Throughout it all, Rayne showed tremendous grace under pressure. Already a strong student, Rayne continued to show up and to shine even as she moved back home and assumed new familial responsibilities. And although her transcript reflects the mandatory credit/fail policy we adopted that semester, in recognition of the variable and extreme challenges faced by our students, I graded the exams blindly in my usual custom. I was not surprised to see Rayne's exam among the top scorers. It was her performance in class, both academically and as a participant in our many class discussions, that led me to ask her to TA my course the following year.

Of course, little did I know at that time how challenging and difficult the following year would be. I taught Criminal Law in the Fall of 2020 in a hybrid format – teaching to a third of the class in person (with masks, socially-distant etc.) with the remainder on Zoom. Suffice it to say that 1L year is not meant to be a virtual experience, and Zoom only exacerbated the challenges of teaching Criminal Law the first semester after the murder of George Floyd and the racial reckoning that followed. I never dreamed that I would have to ask so much of my TAs, but I did. I will spare the gory details, but Rayne and her fellow TAs ended up putting in an extraordinary amount of time – easily four times the usual amount required for TAs, in a semester in which no one had a moment to spare – in order to support, guide, and instruct the students. Rayne, along with the two other TAs, devised and ran both academic and social support programs on Zoom, hosted extra office hours and review sessions, and offered a range of group and individualized support. They also persevered in the face the fury of frustrated and anxious 1Ls, who were isolated by the pandemic and panicked that fritzng wifi meant they would fail the course. Rayne and my other two TAs were nothing short of magnificent – even at what must have been great cost both in terms of Zoom-tolerance and their other coursework demands -- and I would not have survived the course without them. They were bright spots in a dark semester.

By Spring of 2021, however, I was thrilled to be teaching upper level evidence, and to see Rayne join my course. Although she took the course pass/fail, she was her usual self – regularly contributing a sharp new insight or real-world implication. I can't help but notice that Rayne's transcript seems to reinforce my experience of her: she shines brightest in courses with an emphasis on research, writing, and thoughtful participation. I think it is those skills, along with her experience on the Journal of Legislation and Public Policy, that will serve her well as a law clerk. In sum, I highly commend Rayne to your consideration – she's an extraordinary young woman, who I am confident will make an exceptional law clerk.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Erin E. Murphy  
Norman Dorsen Professor of Civil Liberties

Erin Murphy - erin.murphy@nyu.edu - (212) 998-6672

# BRENNAN CENTER FOR JUSTICE

June 6, 2022

***RE: Letter of Recommendation for Rayne Ellis***

To Whom it May Concern:

We write to recommend Rayne Ellis for a term clerkship in your chambers.

This recommendation is submitted jointly by Yuriy Rudensky and Gowri Ramachandran, who respectively taught and supervised Rayne in the Brennan Center Public Policy Advocacy Clinic at the NYU School of Law.

Yuriy is a senior counsel in the Democracy Program at the Brennan Center for Justice and an adjunct professor of clinical law the NYU School of Law. Gowri is a senior counsel in the Elections and Government Program at the Brennan Center for Justice.

Rayne worked closely with both of us from August through December 2020 in seminar and in her clinical fieldwork placement in the Brennan Center's Democracy Program. Rayne proved herself quickly as a resourceful, well-organized, and thorough researcher and a gifted communicator and writer. These abilities helped Rayne stand out as a great clinic student and make her a great candidate for your chambers.

The Brennan Center combines rigorous legal, policy, and empirical research with public writing, litigation, and legislative advocacy to reform the systems of democracy and justice in the United States. To succeed in clinic and meaningfully contribute to our work over the short 14-week term, students must gain a grasp of our substantive goals, position within the field, and advocacy objectives quickly. And because we work in dedicated project teams that requires effective communication and collaboration.

Rayne joined the team that focused on elections security and administration during the 2020 election season. She quickly understood the contours of the work and rapidly picked up the often highly technical background information to be well-versed in the relevant subject matter. She also understood our supportive role in the space at a time when election officials and infrastructure faced unprecedented strain across the U.S. She executed her projects at a high-level and demonstrated both flexibility in handling different sorts of assignments and resourcefulness. She wrote

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Brennan Center for Justice at New York University School of Law  
120 Broadway, Suite 1750 New York, NY 10271

clear and concise legal memos and displayed great creativity, taking on non-traditional assignments like quick reference documents for poll workers to inform them on how to handle emergencies. She was also resourceful in research going well beyond Westlaw to sources such as news articles, county-level websites, and leveraging friend/family relationships with actual voters to establish operative policies and relevant facts.

As you may imagine, the team that Rayne joined in fall 2020 had a tremendous volume of work that required triage and dispatch. Rayne's success flowed from her ability to work quickly and independently. This is all to say that Rayne impressed not just in the substance of her work, but also in her project management. Her team never had questions about the status of her projects and Rayne took time to clarify the scope of assignments she received to ensure that even her first efforts met expectations.

Just as importantly, Rayne's calm demeanor and maturity made her a pleasure to work with in an extremely high stress situation. While many often expect elections related work to slow down after Election Day, this was not the case for Rayne, who was assigned to support us with our advocacy for secure and accessible elections in Georgia. Due to a runoff election in that state, during which unprecedented volumes of malicious election disinformation were being spread by domestic actors, novel risks to running a smooth election presented themselves in the final weeks of her semester with us. Rayne was not only up to the endurance challenge, her steady attitude and consistently high-quality work helped the rest of us keep up our efforts as well.

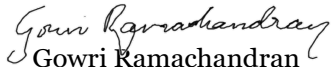
In short, Rayne will make a great law clerk and we have no doubt that she will excel if given the opportunity in your chambers.

Please do not hesitate to reach out if you have questions about Rayne's qualifications.

Sincerely,



Yurij Rudensky  
Senior Counsel, Democracy Program  
Brennan Center for Justice



Gowri Ramachandran  
Senior Counsel, Democracy Program  
Brennan Center for Justice

**WRITING SAMPLE**

**RAYNE H. ELLIS**

88 Lexington Avenue  
New York, NY 10016  
(478) 335-8718  
rayne.ellis@law.nyu.edu

The attached writing sample is my final assignment for Professor Jeremy Waldron's Human Dignity course. Students were tasked with fashioning a paper topic that touched on any of the formulations of dignity that we discussed throughout the course. The paper below, titled What Respect for Human Dignity Requires of Criminal Justice Reform in the United States, argues that there are small changes that must be made to the criminal justice system to work toward restoring the humanity of those who are currently interfacing with it, if we purport to be invested in their dignity. While the paper is largely theoretical, I would suggest reading Part II, Section b.—The Courts, which begins on page 14, and Part III—What Dignity Requires Immediately, which begins on page 32, for the most legal analysis.

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*What Respect for Human Dignity Requires of Criminal Justice Reform in the United States*

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**I. Introduction**

Suffering in the American system of criminal justice is commonplace; cruelty is enmeshed in every fiber; degradation is its very purpose. The United States has a criminal justice problem, meaning that, for many, justice is nowhere to be found. No matter the arm of the system, amount of discretion, or purported constitutionality of a particular policy, those who have been subjected to the vicious excesses of the system have been exposed to practices that attack the very humanity the U.S. government has based its legitimacy on protecting. And while there appears to be widespread recognition that change must come, attempts at reform have fallen short.

Advocates have been unsuccessful in mobilizing a coalition of lawmakers large enough to enact comprehensive reform. Disagreement on the causes, and therefore solutions, to the system's various problems have strangled progress. Eventually, agreement may be essential. The United States often finds itself repeating self-destructive behavior when it does not pull the source of a permeating issue out by its roots.<sup>1</sup> But the millions of men, women, and children who have been subjected to inhumane treatment can no longer wait for the Congressional shoe to drop. Perfect unity is a luxury their humanity cannot afford. So, while those aiming to overhaul the structure of the system do the necessary work of reimagining criminal justice in America, there have to be people working alongside them, advocating for immediate relief in the current system. Any consideration for the dignity of those incarcerated would mandate this multi-layered advocacy effort.

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<sup>1</sup> See, Dan Glaun, *A Timeline of Domestic Extremism in the U.S. from Charlottesville to January 6*, PBS (Apr. 21, 2021), <https://www.pbs.org/wgbh/frontline/article/timeline-us-domestic-extremism-charlottesville-january-6/> (chronicling the rise in white, domestic extremism and the frustration described by Trump Administration officials who revealed that the administration was not taking the threat seriously).

This paper identifies dignity as an organizing principle for small changes that must be made to the criminal justice system and attempts to underscore the importance that those changes are made in tandem with larger reform efforts. Part One of Section II will first operationally define the principle of human dignity and provide an overview of the problems in the system. Then, by surveying issues in the system, Part Two will elucidate the ways that the American criminal justice system fails to adhere to that principle with a particular focus on those that represent an abridgment for certain proxies of dignity such as: respect, autonomy, individuality, value. Section III will discuss the small changes that dignity requires of criminal justice reform. Section IV will be a brief discussion of penal systems in other liberal democracies in order to highlight that small changes are practicable.

## **II. The Problem: A Survey of How Criminal Justice Has Failed in America**

### *Part One: Defining Dignity and America's Overarching Failures*

The dysfunction in the United States criminal justice system is well documented and oft discussed. We are the world's largest jailer,<sup>2</sup> the developed world's harshest punisher,<sup>3</sup> and compared to other democracies, the least certain of what human dignity requires of our system of justice.<sup>4</sup> Right now, more than 2 million people are currently behind bars, 9 million cycle continuously through the country's vast network of local jails, more than 4.5 million are on probation or parole, and more than 70 million have conviction histories that subject them to a host of lifelong collateral consequences that touch every aspect of their lives.<sup>5</sup> Roughly half of all

<sup>2</sup> James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012).

<sup>3</sup> Mirko Bagaric & Sandeep Goplan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS L.J. 169 (2016).

<sup>4</sup> Human dignity is not mentioned in the U.S. Constitution or constitutional amendments.

<sup>5</sup> Ram Subramanian et al., *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUSTICE (Dec. 9, 2020), <https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform>.

those incarcerated are Black; another 17 percent are Hispanic.<sup>6</sup> At least 16 percent of all jail admissions are suffering from a mental illness.<sup>7</sup> We imprison one-third of the estimated 625,000 women and girls who are incarcerated across the globe.<sup>8</sup>

Our scheme of sentencing, one with no mandated consideration of proportionality,<sup>9</sup> has made it such that nonviolent drug offenders and murderers can serve the same amount of prison time.<sup>10</sup> Only in the context of the death penalty death do courts explicitly confront the magnitude of their punishment discretion and the specific circumstances of the individual's suffering from those punishments.<sup>11</sup> It is a feature, not a side effect, that courts rarely consider the tragic pasts that may be partly responsible for criminal behavior or how the communities and families of a defendant will suffer during and long after imprisonment.<sup>12</sup>

That the American criminal justice system needs a rehaul is accepted by a growing number of individuals on both ends of the ideological spectrum; there is not, however, consensus on how to go about accomplishing such reform. Since the beginning of the 2021, 293 disparate bills relating to crime and law enforcement have been introduced in Congress.<sup>13</sup> Several states have considered legislation addressing aspects of the criminal justice system.<sup>14</sup> Just this year,

<sup>6</sup> Cecil J. Hunt II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 336-37 (2020).

<sup>7</sup> Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse*, 41 U.C. DAVIS. L. REV. 111, 132 (2007).

<sup>8</sup> Spencer K. Beall, *Lock Her Up! How Women Have Become the Fastest-Growing Population in the American Carceral State*, 23 BERKELEY J. CRIM. L. 1, 4 (2018).

<sup>9</sup> Traditionally in the United States, if a sentence is within the predetermined guidelines, there is no room for proportionality review, whereas Canada has read a consideration of proportionality into its constitution.

<sup>10</sup> Justin Wm. Moyer, *A Drug Dealer Got a Life Sentence and Was Devastated. So Was the Judge Who Sentenced Him.*, WASH. POST (May 6, 2017), [https://www.washingtonpost.com/local/a-drug-dealer-got-a-life-sentence-and-was-devastated-so-was-the-judge-who-sentenced-him/2017/05/04/efb81020-2aa0-11e7-9b05-6c63a274fd4b\\_story.html](https://www.washingtonpost.com/local/a-drug-dealer-got-a-life-sentence-and-was-devastated-so-was-the-judge-who-sentenced-him/2017/05/04/efb81020-2aa0-11e7-9b05-6c63a274fd4b_story.html).

<sup>11</sup> Nilsen, *supra* note 7, at 114.

<sup>12</sup> Nilsen, *supra* note 7, at 114.

<sup>13</sup> *Crime and Law Enforcement*, GOVTRACK (2021),

[https://www.govtrack.us/congress/bills/subjects/crime\\_and\\_law\\_enforcement/5952#current\\_status\[\]=1](https://www.govtrack.us/congress/bills/subjects/crime_and_law_enforcement/5952#current_status[]=1).

<sup>14</sup> Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, THE APPEAL, <https://theappeal.org/political-report/legislative-round-up/> (last visited June 18, 2021).

Oregon considered legislation against mandatory minimum sentencing and a bill that would enable people to vote from prison; the legislature in Texas considered a bill to speed up parole eligibility for people incarcerated since they were children; Virginia attempted to end some mandatory minimums and reduce solitary confinement.<sup>15</sup> So far, these bills have been held up in state legislatures. Less than a week into his presidency, Joe Biden signed an executive order prohibiting the Department of Justice from entering into new and renewed contracts with private prison companies, yet many advocates argued he did not go far enough.<sup>16</sup> Further, in his address to a Joint Session of Congress, and in the midst of George Floyd's trial, President Biden urged for action aimed at rooting out racism and reforming police departments.<sup>17</sup> And though at least one conservative was moved by his call to action,<sup>18</sup> the filibuster looms large over any significant reform bill that threatens to appear in the Senate chambers.<sup>19</sup> While it is true that perfect unanimity is not necessary to work toward change, disagreements about root causes, politics, and implementation goals have clogged the pathways toward accomplishing comprehensive reform.

Proper consideration of the dignity of those in the penal system could serve as a solvent for whatever blocks advocates from agreement by providing a foundation for urgency. Dignity, however, is an abstract concept, one with no generally agreed upon definition or explicit mention

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<sup>15</sup> *Id.*

<sup>16</sup> Exec. Order No. 14,006, 86 Fed. Reg. 7,483 (Jan. 26, 2021); *see also* Madeline Carlist, 'Much More Work to be Done.' *Advocates Call for More Action Against Private Prisons After Biden's 'First Step' Executive Order*, TIME (Jan. 29, 2021), <https://time.com/5934213/private-prisons-ban-joe-biden/>.

<sup>17</sup> President Joe Biden, Remarks to a Joint Session of Congress (Apr. 29, 2021), (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/>).

<sup>18</sup> Abby Livingston, *Freshman GOP Texas Congressman Made a Personal Pitch to Joe Biden: Let Me Help With Criminal Justice Reform*, TEXAS TRIBUNE (April 29, 2021), <https://www.texastribune.org/2021/04/29/tory-nehls-joe-biden/>.

<sup>19</sup> Giovanni Russonello, *Democrats, About to Miss a Police Reform Deadline, Hold Out Hope*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/us/politics/police-reform-bill-biden-democrats.html>.

in the U.S. Constitution,<sup>20</sup> and therefore must be operationalized before it can be deployed to mollify some of what ails the system.

Gerald Neuman's article *Human Dignity In United States Constitutional Law* distilled several of the principle's core tenets into six maxims: (1) that human beings possess an intrinsic worth that should be recognized and respected; (2) that all human beings possess this intrinsic worth equally by virtue of their humanity; (3) that the state exists for the sake of individual human beings; (4) that some forms of treatment of individuals are inconsistent with respect for this intrinsic worth; (5) that individuals have a right not to be subject to such treatment; (6) and that this intrinsic worth and the consequent right cannot be lost, alienated or forfeited (but it can be violated).<sup>21</sup>

Neuman's definition is incomplete, a fact which he himself noted. It lacks an evaluation of the source of the abovementioned worth, what characteristics of humanity give rise to it, or whether it is transferrable to other species. It does not specify what rights come with human dignity, nor does it determine what forms of treatment are categorically inconsistent with human dignity. This conception of dignity is not meant to answer every question but rather, serve as a functional baseline from which all the criminal justice policies in the United States can be evaluated.

It is important to note, that though dignity has no explicit mention in the Constitution, it played a significant role in its drafting. At the Constitutional Convention, the Framers held extensive debates on the nature of what individual rights should be protected and guaranteed,

<sup>20</sup> Cecil J. Hunt II, *The Jim Crow Effect: Denial, Dignity, Human Rights, and Racialized Mass Incarceration*, 29 J. CIV. RTS & ECON. DEV. 15, 34 (2016).

<sup>21</sup> Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, ZURE AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 241, 249-50 (Dieter Simon & Manfred Weiss eds. 2000).

leading to the addition of the Bill of Rights.<sup>22</sup> Further, the Declaration of Independence is rife with references to a vision of government that reflects a consciousness of individual dignity.<sup>23</sup> For example, it maintains that “all men are created equal, that they are endowed by their Creator with unalienable rights,” and that those rights are meant to be protected by the government empowered by the governed.<sup>24</sup> Neuman goes so far to say that the “entire edifice” of U.S. Constitutional law is built on a vision of human dignity which is reflected by the mention of popular sovereignty, representative government, and entrenched individual rights in the framing documents.<sup>25</sup>

More recently, the Supreme Court has relied on the value of human dignity to interpret and establish the boundaries of what is protected under the Constitution, particularly in the Eighth Amendment jurisprudence prohibiting cruel and unusual punishment.<sup>26</sup> This understanding has been deployed to strike down the state-sanctioned execution of those with mental disabilities<sup>27</sup> and extended to cases involving prison conditions “antithetical to human dignity.”<sup>28</sup> Though the court has only demonstrated a willingness to invoke human dignity in instances where the treatment of a human being shocks the conscience.<sup>29</sup>

Indeed, the absence of an explicit mention in the Constitution has not been fatal for dignity’s relevance in the United States. The Declaration of Independence makes mention of equality and inalienable rights while establishing that the legitimacy of the newly established government relies on the consent of the governed. The Preamble to the Constitution recognizes

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 252.

<sup>26</sup> Alison Shames & Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections*, 27 FED. SENT. R. 9, 11 (2014) [hereinafter *Doing the Right Thing*].

<sup>27</sup> *Id.* at 11 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

<sup>28</sup> *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 745, 751 (2002)).

<sup>29</sup> *Id.*

its source of power as the people of the United States and identifies its purpose as to establish justice among other things.<sup>30</sup> But these founding documents, thought to be radical in their proclamation of human rights, also harbored protections for the institution of slavery and guarantees for slaveholders.<sup>31</sup> The Supreme Court's support for "separate-but-equal" in *Plessy v. Ferguson* further transmogrified the American conception of human rights so forcefully argued for by the founders in its legal authorization of disparate treatment.<sup>32</sup> It is this contradiction, this imperfect commitment to human dignity, that looms large over the history United States and continues to characterize its relationship to justice in the 21<sup>st</sup> century. Nowhere is the United States failing its citizens more than the criminal justice system.

Criminal justice in the United States implicates several of the government's functions and significant failure is pervasive no matter the sector. With Neuman's definition in mind, this section will address a number of critical violations of human dignity that persist in the criminal justice system categorized by whichever arm of the system it emanates from. The system will be divided into three components: law enforcement, the courts, and the correctional system. Some attention will be given to legislative failures and post-release factors. The purpose of this survey is meant to draw attention to a wide range of indignities pervasive in the system, however, it will not be able to capture the full scope of the ways in which the United States criminal justice system is failing and will not attempt to.

### *Part Two: The Specifics of America's Failure to Respect Dignity*

#### **a. Law Enforcement**

<sup>30</sup> Neuman, *supra* note 21, at 252.

<sup>31</sup> Neuman, *supra* note 21, at 252.

<sup>32</sup> Neuman, *supra* note 21, at 252.

As a result of several high-profile police killings of mostly unarmed, mostly black citizens, police departments and other law enforcement agencies (“police”) have received a significant amount of public scrutiny.<sup>33</sup> Police are given broad, constitutionally-protected discretion.<sup>34</sup> They are frequently asked to respond to issues that they are not equipped for or trained to address, like mental health emergencies or homelessness.<sup>35</sup> Many departments have enormous budgets compared to other vital community programs.<sup>36</sup> Their training focuses largely on the use of force rather than reducing the need for it.<sup>37</sup> In turn, the police shoot, choke, physically assault, and blind individuals with impunity;<sup>38</sup> frequently in response to minor infractions.<sup>39</sup>

But even more sinister is the apparently symbiotic relationship between policing and white supremacy in America. In a report published by the Brennan Center for Justice, former FBI agent Michael German evaluated the government’s response, or lack thereof, to the pervasiveness of white supremacy in police departments.<sup>40</sup> Usually, after incidents of racist

<sup>33</sup> Khaleda Rahman, *From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (12/29/2020), <https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285>; see also Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>34</sup> See, Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 265 (2010).

<sup>35</sup> *Policing in America*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/policing-in-america/> (last visited June 22, 2021).

<sup>36</sup> *Id.*

<sup>37</sup> Margaret Harding McGill & Erica Pandey, *America’s Broken System of Training Cops*, AXIOS (June 7, 2020), <https://www.axios.com/police-training-george-floyd-2654f96d-fc58-4c59-8d04-e279f50c7107.html>.

<sup>38</sup> See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>; Joseph Wilkerson, *California Cop Who Blinded Woman in One Eye with Beanbag Round Not Charged with Crime*, N.Y. DAILY NEWS (Jan. 7, 2021), <https://www.nydailynews.com/news/national/ny-san-diego-cop-blind-woman-beanbag-round-not-charged-20210107-wwzwdqp4mraufz2cagni7ew7e-story.html>.

<sup>39</sup> Michael Balsamo, Michael R. Sisak, Colleen Long & Tom Hays, *Police Officer in ‘I can’t breathe’ Death Won’t be Charged*, AP NEWS (July 16, 2019), <https://apnews.com/article/new-york-ny-state-wire-nyc-wire-brooklyn-staten-island-3c72405c9f874844a84b0ca658402078>.

<sup>40</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUSTICE (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law/>.

misconduct or brutality by the police, communities are energized to seek reform. An aspect of those reforms often focuses on addressing unconscious manifestations of bias and explicit reaffirmation of the goal to protect the “dignity, rights, and safety of all people.”<sup>41</sup> For example, the U.S. Department of Justice (DOJ), demands implicit bias training and as part of the consent decrees it imposes in order to root out discriminatory practices in law enforcement agencies.<sup>42</sup> These efforts, however, work poorly against the sizeable number of individuals in law enforcement who harbor explicitly racist beliefs.

Explicit racism in a police officer can manifest in a number of ways: from membership or affiliation with violent white supremacist or far-right militant groups, to engaging in racially discriminatory behavior toward the public or law enforcement colleagues, to racist social media posts.<sup>43</sup> In Miami, Florida, police officers choked, arrested, and prosecuted a 14-year-old boy after he allegedly gave them a dehumanizing stare; he was bottle feeding a new born puppy.<sup>44</sup> Two officers in Aurora, Colorado ordered a black family with four children, one as young as six, out of a vehicle at gunpoint and made them lie face down on the ground.<sup>45</sup> One of the New York Police Department’s highest-ranking officers, Christopher McCormack, allegedly subjected at least two dozen Black and Latino men to invasive, humiliating strip searches, which one victim

<sup>41</sup> Press Release, Dep’t of Justice, *Justice Department Reaches Agreement with City of Baltimore to Reform Police Department’s Unconstitutional Practices* (Jan. 12, 2017), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-baltimore-reform-police-department-s>; see also German, *supra* note 40.

<sup>42</sup> German, *supra* note 40.

<sup>43</sup> German, *supra* note 40.

<sup>44</sup> *Police Abuse of People of Color Is Not Limited to Shooting Deaths*, EQUAL JUST. INITIATIVE (July 14, 2016), <https://eji.org/news/police-abuse-of-people-of-color-not-limited-to-fatal-shootings/>.

<sup>45</sup> Michael Levenson, *Officers Who Handcuffed Black Family Won’t be Charged, Prosecutors Say*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/us/aurora-colorado-police-black-family.html>.

compared to sexual abuse.<sup>46</sup> In Chicago, officers raided the home of a social worker, who was left naked and handcuffed for 20 minutes.<sup>47</sup>

Then there are countless instances of racism on social media; A North Charleston policeman posted a photo of himself in Confederate flag underwear a few days after the nine black worshippers at Emanuel AME Church were murdered.<sup>48</sup> A Phoenix officer proclaimed in a post, “It’s a good day for a choke hold.”<sup>49</sup> An officer from Detroit said that he “would kill himself” if he were born Black.<sup>50</sup> Officers in San Jose, California were suspended for their participation in a Facebook group that regularly posted racist and anti-Muslim content.<sup>51</sup>

A review of police behavior on Facebook documented the systemic nature of the racist behavior across several departments in the country and revealed a disturbing pattern of racist imagery and vitriolic exchanges.<sup>52</sup> A Chicago-based nonprofit newsroom then used that database and found that many officers who made offensive posts were also accused of brutality or civil rights violations.<sup>53</sup>

<sup>46</sup> Joaquin Sapien, Topher Sanders & Nate Schweber, *Over a Dozen Black and Latino Men Accused a Cop of Humiliating Invasive Strip Searches. The NYPD Kept Promoting Him*, PROPUBLICA (Sept. 10, 2020), <https://www.propublica.org/article/over-a-dozen-black-and-latino-men-accused-a-cop-of-humiliating-invasive-strip-searches-the-nypd-kept-promoting-him>.

<sup>47</sup> Peter Nickeas, *Behind the Mistaken Raid by Chicago Police on an Innocent Social Worker’s Home*, CNN.COM (Dec. 20, 2020), <https://www.cnn.com/2020/12/19/us/chicago-police-mistaken-raid/index.html>.

<sup>48</sup> Andrew Knapp, *Police Officer Fired for Confederate Flag Underwear Settles Lawsuit Against City for \$55,000*, POST AND COURIER (Sep. 14, 2020), [https://www.postandcourier.com/news/police-officer-fired-for-confederate-flag-underwear-settles-lawsuit-against/article\\_03a2cb4c-bb43-11e7-b1e6-0f236c2bd1e2.html](https://www.postandcourier.com/news/police-officer-fired-for-confederate-flag-underwear-settles-lawsuit-against/article_03a2cb4c-bb43-11e7-b1e6-0f236c2bd1e2.html).

<sup>49</sup> Emily Hoerner & Ricky Tulskey, *Cops Across the US Have Been Exposed Posting Racist and Violent Things on Facebook. Here’s the Proof.*, BUZZFEED NEWS (July 23, 2019), <https://www.buzzfeednews.com/article/emilyhoerner/police-facebook-racist-violent-posts-comments-philadelphia>.

<sup>50</sup> Frank Witsil, *Warren Police Investigating Officer Accused of Posting Racist Comments on Facebook*, DETROIT FREE PRESS (June 15, 2021), <https://www.freep.com/story/news/2021/06/15/warren-police-racist-facebook-posts/7700854002/>.

<sup>51</sup> Jason Green & Robert Salonga, *San Jose Police Officers Posts Exposed by Blogger*, MERCURY NEWS (June 26, 2020), <https://www.mercurynews.com/2020/06/26/san-jose-police-officers-racist-facebook-posts-exposed-by-blogger/>.

<sup>52</sup> Hoerner & Tulskey, *supra* note 49.

<sup>53</sup> Hoerner & Tulskey, *supra* note 49.

Countless officers have been exposed for racist texts or emails in San Francisco, Los Angeles, and Portland.<sup>54</sup> Officers in Wilmington, North Carolina were caught on a car camera using racial epithets, talking about shooting Black people (including an officer). One even said he couldn't wait for Martial law so they could go out and "slaughter" Black people.<sup>55</sup>

These instances of inhumane treatment institute a pattern of humiliating and degrading treatment of people of color by actors in the U.S. criminal justice system. Some argue that humiliation and degradation are dependent on dignity in that the former implicate an injury to the latter.<sup>56</sup> While this injurious behavior is not explicitly sanctioned, its historical impunity has irrevocably transformed the relationship between people of color and the government built to protect them. That which affirmatively humiliates and degrades, erodes the dignity of both the victim and the punisher.

The problem is widespread. And the behavior that emanates from these ideological leanings could be devastating for an individual and/or a community. Federal, state, and local governments do very little to identify them, report their behavior, or protect the diverse communities they are directed to serve.<sup>57</sup> It is not impossible to imagine a scenario where a prosecutor solicits testimony from an officer in a criminal case and that same officer is making racist posts on social media.<sup>58</sup> This revelation makes it more difficult to ignore the ways in which

<sup>54</sup> Scott Glover, 'Wild Animals': Racist Texts Sent by San Francisco Police Officer, Documents Show, CNN.COM (Apr. 26, 2016), <https://www.cnn.com/2016/04/26/us/racist-texts-san-francisco-police-officer/index.html>; Michael Pearson, Los Angeles County Sheriff Official Resigns over Racist Messages, CNN.COM (May 2, 2016), <https://edition.cnn.com/2016/05/02/us/los-angeles-sheriff-chief-tom-angel-racist-emails/index.html>; Katie Shepherd, Texts Between Portland Police and Patriot Prayer Ringleader Joey Gibson Show Warm Exchange, WILLAMETTE WEEK (Feb. 14, 2019), <https://www.wweek.com/news/courts/2019/02/14/texts-between-portland-police-and-patriot-prayer-ringleader-joey-gibson-show-warm-exchange/>.

<sup>55</sup> Wilmington Police Department, *Profession Standards Report of Internal Investigation*, at 8 (June 11, 2020), <https://www.wilmingtonnc.gov/home/showdocument?id=12012>.

<sup>56</sup> Daniel Statman, *Humiliation, Dignity, and Self-Respect*, 13 PHILOSOPHICAL PSYCHOLOGY 523 (2010).

<sup>57</sup> German, *supra* note 40.

<sup>58</sup> Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely upon Their Testimony at Trial?*, THE APPEAL (July 29, 2019), <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/>.

Black and Brown men are overwhelmingly and systematically targeted by the police in the United States. While Black Americans account for only 13 percent of the population, they make up a quarter of all police shooting victims.<sup>59</sup> An unarmed Black man is about four times more likely to be killed by police than an unarmed white man.<sup>60</sup>

This brutality is not limited to lethal force. People of color in the United States are subjected to beatings, threats, and other forms of humiliation and disrespect that are less lethal, but still impact the psyche. One study by the Center for Policing Equity, using data from police departments around the country, found that police are 3.6 times as likely to use force against Black people than white people.<sup>61</sup> Another study found by an economics professor at Harvard that Black people were 50 percent more likely to be subjected to nonlethal force by the police, like being handcuffed, pushed to the ground, or hit with pepper spray.<sup>62</sup> A Black person is five times more likely to be stopped without just cause than a white person.<sup>63</sup> Black drivers been more likely to be stopped than white drivers and are more likely to be searched and arrested.<sup>64</sup> In 2016, Black Americans comprised 27 percent of all individuals arrested in the United States, more than double their share of the total population.<sup>65</sup> That same year, Black youth account for 15% of all U.S. children yet made up 35% of juvenile arrests.<sup>66</sup> This disparity in treatment

<sup>59</sup> Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate & Wesley Lowery, *What We've Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), <https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true> [hereinafter *Police Shooting Report*].

<sup>60</sup> *Id.*

<sup>61</sup> Benedict Carey & Erica Goode, *Police Try to Lower Racial Bias, but Under Pressure, It Isn't So Easy*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/2016/07/12/science/bias-reduction-programs.html?smid=pl-share>.

<sup>62</sup> *Id.*

<sup>63</sup> *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> (last visited June 25, 2021) [hereinafter *Fact Sheet*].

<sup>64</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

weighs heavily on Black Americans. Police killings of unarmed Black people are responsible for more than 50 million additional days of poor mental health per year among Black Americans.<sup>67</sup>

Police cruelty is not only reserved for people of color. White Americans are abused and killed by police at grotesquely high rates compared to other rich nations.<sup>68</sup> In fact, though black Americans are shot at a disproportionate rate, half of all people shot and killed by police are white;<sup>69</sup> a talking point many conservatives have used to demonstrate that the problem with policing is not borne out of racism. This simply underscores the fact that it is not *only* racism that triggers the need for dignity-centric police reform, but rather, the way in which police interact with society must be entirely reimaged. More than 2,500 police departments have shot and killed at least one person since 2015.<sup>70</sup> Since 2015, police have shot and killed an average of 3 people per day.<sup>71</sup> In 2020 alone, 1,126 people were killed by police.<sup>72</sup> Most of those deaths were by shootings, but other forms of physical force, tasers, and police vehicles accounted for the other deaths.<sup>73</sup> Many of the officers committing these acts of violence had shot and killed someone before.<sup>74</sup> Most killings happened as a result of police responding to suspected non-violent offenses or in instances where no crime was reported.<sup>75</sup> 120 people were killed after police stopped them for a traffic violation.<sup>76</sup> 97 people were killed after responding to reports of someone behaving erratically or having a mental health crisis.<sup>77</sup>

<sup>67</sup> *Fact Sheet*, *supra* note 63.

<sup>68</sup> Alexei Jones & Wendy Sawyer, *Not Just “a Few Bad Apples”: U.S. Police Kill Civilians at Much Higher Rates Than Other Countries*, PRISON POL’Y INITIATIVE (June 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policekillings/>.

<sup>69</sup> *Police Shooting Report*, *supra* note 61.

<sup>70</sup> *Police Shooting Report*, *supra* note 61.

<sup>71</sup> *Police Shooting Report*, *supra* note 61.

<sup>72</sup> *2020 Police Violence Report*, MAPPING POLICE VIOLENCE, <https://policeviolencereport.org/> (last visited Oct. 25, 2021).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Exploiting the instances of white victimization in order to diffuse responsibility from racist practices and policies does little to address the source of the concern. There is an unambiguous lack of consideration of human dignity in law enforcement. That it overwhelmingly targets one particular caste of individuals is certainly the result of unaddressed racism in all arms of the criminal justice system, as well as a functional lack of accountability and introspection into the role this particular arm plays into the perpetuation of this reality. It would be impossible to list the numerous iterations of dignity-violating cruelty that persist in policing. Nonetheless, the issue can at least in part be blamed on carelessness and comfort in complicity.

#### **b. The Courts**

Like law enforcement, the court system is rampant with instances of cruelty and treatment violative of human dignity. Since violence, however, does not characterize the court's interaction with most, these violations tend to be more subtle and avoid the piercing eyes of public scrutiny. Still, courts significantly contribute to the failures of the American criminal justice system. Those subtle violations can range from imposing severe sentence lengths, to requiring shackles for hearings, to refusing to address the defendant directly. There is also the additional concern of plea bargaining, the incentives overworked courts have to avoid jury trials, and the ways in which ill-informed defendants get taken advantage of for the sake of efficiency. Nonetheless, all feed into a system of dehumanization, meant primarily to prepare the offender for the ultimate deprivation of dignity and liberty in the American correctional system.

As mentioned previously, American punishment has become “degrading, indecently, and undeservedly harsher, despite a constitution designed to protect people from infliction of

excessive punishment.”<sup>78</sup> One particularly egregious way that courts contribute to that problem is by not weighing certain critical factors when making decisions about what kind of punishment to deliver. For example, the court does not consider the human cost of those punishments (unless facing the death penalty), the inhumane treatment the person being sentenced is likely to face, or that time in prison provides poor preparation for a productive life afterwards.<sup>79</sup>

What’s worse, the American scheme of justice does not provide real proportionality review for criminal sentencing outside of the death penalty.<sup>80</sup> This is despite the Court’s decision in *Solem v. Helm*<sup>81</sup> which found that the Eighth Amendment prohibits not only barbaric punishment, but also punishments that are disproportionate to the offense. *Solem* also created the threshold test of “gross proportionality,” which listed three factors, any of which might have a sufficient role in a sentence to invalidate it: (1) “the gravity of the offense and the harshness of the penalty[;]... (2) the sentences imposed on other criminals in the same jurisdiction[; and] (3) the sentences imposed for commission of the same crime in other jurisdictions.”<sup>82</sup> This test was then reinterpreted and narrowed in *Harmelin v. Michigan*,<sup>83</sup> where the court interpreted the factors as each by themselves sufficient to save a sentence, regardless of the weight a court might attach to the other two, making it rare for a sentence to fail the test.<sup>84</sup>

In *Harmelin*, the Court was tasked with determining whether a life sentence without the possibility of parole was excessive under the Eighth Amendment and whether *Harmelin* had a right to have his sentence determined on the individual facts of his crime and background rather

<sup>78</sup> Nilsen, *supra* note 7, at 113.

<sup>79</sup> Nilsen, *supra* note 7, at 114.

<sup>80</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3184 (2015).

<sup>81</sup> 463 U.S. 277, 284 (1983) (holding unconstitutional a life without parole sentence imposed on a petty offense recidivist).

<sup>82</sup> *Id.* at 290-91.

<sup>83</sup> 501 U.S. 957, 1004-05.

<sup>84</sup> Nilsen, *supra* note 7, at 148.

than the one-size-fits-all mandatory life sentence.<sup>85</sup> Harmelin, a former Air Force honor guard, was convicted for possession of a pound and a half of cocaine. He had no history of violence and no criminal history. The court upheld his sentence against both claims.<sup>86</sup> The penalty, at the time it was dealt out, was the same as that of first-degree murder.<sup>87</sup>

The court applied this test again in *Ewing v. California*.<sup>88</sup> In *Ewing*, the Court found no disproportional punishment in upholding California's application of the state's "third strike" recidivism law, which sentenced Gary Ewing to twenty-five-years-to-life for stealing three golf clubs.<sup>89</sup> Justice Breyer warned in his dissent that "a threshold test that blocked every ultimately invalid constitutional claim—even strong ones— would not be a threshold test but a determinative test."<sup>90</sup> Justice Breyer's warning proved to be foreshadowing. These days, the test of gross proportionality does little to no work in correcting the criminal justice system of its excesses, nor does it protect victims from state-sponsored violations of their dignity. Gary Ewing and Ronald Harmelin's stories are ones that have come to characterize the administration of justice in America.

And though courts and legislatures have taken steps reform the same "three strikes" laws and mandatory minimum penalties that doomed Gary Ewing and Ronald Harmelin to toil in prison for life,<sup>91</sup> the progressive movement has not yet reached every jurisdiction in the country. For example, in 2020 the Mississippi Supreme Court sentenced a man to 12 years in prison for

<sup>85</sup> Nilsen, *supra* note 7, at 113.

<sup>86</sup> Harmelin, 501 U.S. 957, 996 (1991).

<sup>87</sup> Ruth Marcus, *Life in Prison for Cocaine Possession?*, WASH. POST (Nov. 5, 1990), <https://www.washingtonpost.com/archive/politics/1990/11/05/life-in-prison-for-cocaine-possession/7667b420-79f4-4a4f-984d-cc32cec422fa/v>.

<sup>88</sup> 538 U.S. 11 (2003).

<sup>89</sup> *Id.* at 29-31.

<sup>90</sup> *Id.* at 43 (2003) (Breyer, J., dissenting).

<sup>91</sup> Elizabeth Weill-Greenberg, *'It Tears Families Apart': Lawmakers Nationwide Are Moving to End Mandatory Sentencing*, THE APPEAL (Apr. 15, 2021), <https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing/>.

possessing a cellphone in a county jail. Willie Nash, a married father of three, asked a guard for “some juice” to charge his cell phone.<sup>92</sup> The phone was confiscated and the jury sentenced him to 12 years in prison.<sup>93</sup> At his hearing the trial said that “while his crime may have seemed insignificant to him, there was a reason [that] possessing a cell phone in a correctional facility was ‘such a serious charge.’”<sup>94</sup> The judge also told Nash to consider himself fortunate since his numerous burglary convictions could have triggered a habitual offender law which would have subjected him to a fifteen-year sentence.<sup>95</sup> Though the Mississippi Supreme Court found the case to be “harsh,” Nash’s sentence fell within the statutory range of three to 15 years and he was unable to demonstrate that a threshold comparison of the crime committed to the sentence imposed led to an inference of gross disproportionality. Therefore, his conviction was affirmed.<sup>96</sup>

In the absence of statutorily prescribed proportionality review, judges are unable to intervene on the behalf of the defendant, even when faced with even the most sympathetic cases. In the case of *United States v. Angelos*,<sup>97</sup> Judge Cassell begrudgingly passed a 55-year sentence on 25-year-old man convicted of selling marijuana, possessing firearms, and money laundering, stating, “While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties.”<sup>98</sup> The judge

<sup>92</sup> Nash v. State, 293 So.3d 265, 266 (Miss. 2020).

<sup>93</sup> Minyvonne Burke, *Mississippi Man Gets 12 Years in Prison for Possessing a Cellphone in County Jail*, NBC News (Jan. 17, 2020), <https://www.nbcnews.com/news/us-news/mississippi-man-got-12-years-prison-possessing-cellphone-county-jail-n1117951>.

<sup>94</sup> Nash, 293 So.3d at 267.

<sup>95</sup> *Id.*

<sup>96</sup> Nash, 293 So.3d at 266 (Miss. 2020).

<sup>97</sup> *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004), *aff’d* 433 F.3d 738 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 723, 723 (2006).

<sup>98</sup> *Id.* at 1230.

reasoned that he could not act on his own finding that the sentence appeared cruel and unusual because a previous sentence upheld in the Supreme Court in *Hutto v. Davis* bound him.<sup>99</sup>

And though judges and juries are the parties who essentially swing the sword, a lot of times they are legally bound to pass harsh sentences because of the charges brought before them. This isn't to say that judges are not to blame for their role in perpetuating the indignities of the criminal justice system, far from it. In fact, there are a number of little indignities that judges commit under the guise of maintaining order in the court room. For example, requiring that convicted prisoners wear shackles in civil trial proceedings,<sup>100</sup> not addressing the criminal defendant directly in court, not informing the incarcerated individual of their right to appear in civilian clothes.<sup>101</sup>

There are also countless instances when judges exceed their authority and pass sentences that far exceed what any legislature would allow, and they do so with impunity.<sup>102</sup> A judge in Alabama sentenced a single mother to 496 days behind bars for failing to pay traffic tickets, exceeding the jail time Alabama allows for negligent homicide. As a result, the mother's three children were thrust into foster care, where one daughter was molested and another was physically abused.<sup>103</sup> That mother was one of hundreds the judge threw in jail for failure to pay fines; to list some of the others: a plumber struggling to make rent, a mother who skipped meals to cover her disabled son's medical bills, a hotel housekeeper working to pay for college.<sup>104</sup>

<sup>99</sup> Nilsen, *supra* note 7, at 151 (2007) (explaining that a forty-year prison sentence for possession of nine ounces of marijuana with intent to sell it was upheld by the Supreme Court).

<sup>100</sup> Nhut G. Tran & Reena Kapoor, *Shackling Convicted Prisoners During Civil Trial Proceedings*, 48 J. AM. ACAD. PSYCHIATRY L. 117 (2020).

<sup>101</sup> Richard R. Shiarella, Comment Note, *Propriety and Prejudicial Effect of Compelling Accused to Wear Prison Clothing at Jury Trial – State Cases*, 99 A.L.R.6TH 295 (2021).

<sup>102</sup> Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

There are thousands of other instances of judicial misconduct, some so corrosive on the pursuit of justice that they call the validity of the entire system into question. A judge in Texas burst in on jurors deliberating the case of a woman charged with sex trafficking and declared that God told him that the defendant was innocent.<sup>105</sup> A judge in Alabama chose his own son in at least 200 cases to serve as a court-appointed defense lawyer for the indigent, enabling the son to earn at least \$105,00 in fees over two years.<sup>106</sup> Pennsylvania had to expunge the criminal records for 2,251 juveniles after discovering that two judges were taking kickbacks as a part of scheme to fill a private juvenile detention center.<sup>107</sup> The judiciary is not always at fault in such corrupt ways, but it is always complicit.

Often, when the judges are not directly at fault, it is because the prosecutor, in a completely lawful exercise of discretion, has concocted a particularly cruel set of charges. For example, in *Nash*, the defendant was charged under Mississippi Code Section 47-5-193 which makes it unlawful for an individual in prison to “posses, furnish, attempt to furnish, or assist in furnishing to any offender confined in [Mississippi] any weapon, deadly weapon, unauthorized electronic device, contraband item, or cell phone.”<sup>108</sup> In authorizing prosecutors to pursue 3 to 15 years<sup>109</sup> for violators of this provision, the legislature likely expected for prosecutors to use their discretion wisely. Instead, the prosecutor in *Nash* sought four times the statutory minimum for the innocuous possession of a cell phone; one that likely would not have been on his person if booking procedure for the county jail was actually followed.<sup>110</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> MISS. CODE ANN. § 47-5-193 (2015).

<sup>109</sup> MISS. CODE ANN. § 47-5-195 (2015).

<sup>110</sup> *Nash*, 293 So.3d at 270-71 (King, J., concurring).

In *Angelos*, prosecutors pursued charges under a notoriously harsh federal law instead of less harsh state charges.<sup>111</sup> The relevant statute, 18 U.S.C. § 924(c), carried an obligatory five-year sentence for possessing a firearm during a drug transaction and a twenty-five-year sentence for each subsequent transaction.<sup>112</sup> Multiple charges can be brought under § 924(c) in one case. The mandatory sentences must be served consecutively, as opposed to simultaneously. A criminal record is not a prerequisite to open oneself up to prosecution under this statute.<sup>113</sup> The firearm does not have to be brandished or used, nor does the law require any form of violence or injury to be caused or threatened.<sup>114</sup> When prosecutors charged *Angelos* with three § 924(c) counts, they damned him to a predetermined 55 years in prison.

The American criminal justice system bestows a significant amount of power onto prosecutors. As professors Erik Luna and Marianne Wade described in their discussion of prosecutorial power, their nearly limitless discretion has the ability to expedite or hinder the pursuit of justice:

They decide whether to accept or decline a case; and on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed on conviction.<sup>115</sup>

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<sup>111</sup> Erik Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium: Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413, 1415 (2010).

<sup>112</sup> 18 U.S.C. § 924(c)(1)(2006).

<sup>113</sup> *Id.*

<sup>114</sup> Luna & Wade, *supra* note 111, at 1415.

<sup>115</sup> Luna & Wade, *supra* note 111, at 1415.

Prosecutors are, in a sense, law enforcement officers and judges in the way that they have the power to enforce and sentence. Some scholars go as far as suggesting that prosecutors themselves *are* the criminal justice system.<sup>116</sup> They wield a significant amount of concentrated power and have nearly unfettered discretion. Additionally, prosecutors have an unreviewable ability to decline cases and their decisions cannot be overturned by judges.<sup>117</sup> Meaning, ultimately, that prosecutors have the power to refuse to seek justice on the behalf of persons who have been wronged. Their decisions shed light on whose victimhood is valued and who is seen as worthy of protection in the eyes of the state. A Washington Post analysis found that of the nearly 50,000 homicides committed around the country, an arrest was made in 63 percent of murders of white victims, compared to 48 percent of Latinx victims, and 46 percent of Black victims.<sup>118</sup> Respect for the dignity of victims of color would come in the form of more justice.

Abuse and misconduct are widespread in this arm of the system. Consequences for those abuses, however, are few and far between. Courts frequently grant prosecutors immunity from civil lawsuits and prosecutors are almost never tried in criminal court for their actions.<sup>119</sup> The following is a non-exhaustive list created by the National Police Accountability project of the type of misconduct for which prosecutors are entitled to absolute immunity because these actions purportedly relate to their role in the judicial process: falsifying evidence; coercing witnesses; soliciting and knowingly sponsoring perjured testimony; withholding exculpatory evidence and/or evidence of innocence; introducing evidence known to be illegally seized at trial;

<sup>116</sup> Luna & Wade, *supra* note 111, at 1415.

<sup>117</sup> Luna & Wade, *supra* note 111, at 1428.

<sup>118</sup> Wesley Lowery, Kimbriell Kelly, Ted Mellnik & Steven Rich, *Where Killings Go Unsolved*, WASH. POST (June 6 2018), <https://www.washingtonpost.com/graphics/2018/investigations/where-murders-go-unsolved/>.

<sup>119</sup> *Abuse of Power by Prosecutors*, FAIR FIGHT INITIATIVE, <https://www.fairfightinitiative.org/abuse-of-power-by-prosecutors/> (last visited Oct. 25, 2021).

initiating a prosecution in bad faith.<sup>120</sup> This functional immunity carved out for prosecutors has made it difficult for advocates to hold them accountable, even for particularly egregious behavior.

The above concerns do not even address the twisted incentives associated with pleas. These incentives implicate a whole host of failures in the American criminal justice system: the public defense system, cash bail, jury trials, prosecutorial deference, overrun court dockets. Coercion and decision-making under duress characterize the institution of plea negotiations and plea deals have overrun the American criminal justice system. In 2018, 90 percent of the nearly 80,000 defendants in federal criminal cases plead guilty.<sup>121</sup> Maybe each individual was guilty, but it is more likely that insidious factors were at play. For example, it is not unimaginable that the defendant would be the breadwinner in a family with four children and rather than waiting six months for a trial, they would take the plea deal.<sup>122</sup> Perhaps they were informed that fewer than one percent of those who go to trial for federal criminal charges are acquitted.<sup>123</sup> Or maybe, the defendant does not want to be subjected to the tremendous deprivation of privacy that tends to define jury trials. Ultimately, the success of the plea incentive structure is at least in part due to a settled expectation of humiliation in American courts, though the alternative still degrades. Defendants' dignity will suffer either way.

Last year prosecutorial ethics became a topic of national conversation as a result of two tragic shooting deaths of Black people: Ahmaud Arbery and Breonna Taylor.

<sup>120</sup> *Learn About the Effects of Absolute Immunity for Prosecutors. Read More Below.*, NAT'L POLICE ACCOUNTABILITY PROJECT, <https://www.nlg-npap.org/absolute-immunity/> (last visited Oct. 26, 2021).

<sup>121</sup> John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

<sup>122</sup> Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/>.

<sup>123</sup> Gramlich, *supra* note 121.

In Brunswick, Georgia, Ahmaud Arbery, a 25-year-old black man, was chased by three white men in a pick-up truck while jogging through a neighborhood. Two of the men, a father and son named Travis and Gregory McMichael, then exited the truck with guns and shot him after the confrontation.<sup>124</sup> Travis McMichael then muttered a racial slur after taking Mr. Arbery's life.<sup>125</sup> The McMichaels were not arrested at the time; due, allegedly, to instructions from Brunswick District Attorney Jackie Johnson, who had worked with the elder McMichael for a number of years in her capacity as a district attorney.<sup>126</sup>

Not only did Johnson wait four days to report the conflict to the Georgia attorney general's office, but she also authorized neighboring District Attorney Paul Barnhill to handle the matter in direct contravention of Georgia law.<sup>127</sup> Barnhill had conflicts of his own, as his son was an assistant district attorney working for District Attorney Johnson at the time and had worked with Greg McMichael in a prosecution of Arbery when Arbery was in high school.

Barnhill did not disclose his disqualifying conflict of interest until April 7, weeks after he was made aware of his son's relationship with both the suspect and the victim. In the weeks before reporting his conflict, Barnhill also authored a controversial written opinion to the Glynn Police Department and subsequent prosecutor insisting that there were no grounds to arrest the McMichaels.<sup>128</sup> Both McMichaels were arrested on May 7, charged with murder and aggravated assault, and later indicted alongside William Bryan, who filmed the encounter.<sup>129</sup> Johnson has

<sup>124</sup> David L. Hudson Jr., *Prosecutorial Ethics Are in the Spotlight After the Death of Ahmaud Arbery*, ABA JOURNAL (July 16, 2020), <https://www.abajournal.com/web/article/prosecutorial-ethics-are-in-the-spotlight-after-the-shooting-of-ahmaud-arbery>.

<sup>125</sup> Brakkton Booker, *White Defendant Allegedly Used Racial Slur After Killing Ahmaud Arbery*, NPR (June 4, 2020), <https://www.npr.org/2020/06/04/869938461/white-defendant-allegedly-used-racial-slur-after-killing-ahmaud-arbery>.

<sup>126</sup> Hudson Jr., *supra* note 124.

<sup>127</sup> Hudson Jr., *supra* note 124.

<sup>128</sup> Hudson Jr., *supra* note 124.

<sup>129</sup> Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

been voted out of office and is now the subject of a grand jury probe by the State Attorney General Chris Carr.<sup>130</sup>

A few months later in Louisville, Kentucky, Attorney General Daniel Cameron's actions in the wake of the shooting death of Breonna Taylor drew a lot of attention to the amount of power prosecutors hold. After spending six months investigating the shooting that resulted in cops killing Taylor while sleeping in her own home, he only recommended charges of wanton endangerment against one of the three officers who all fired a total of 32 shots into her apartment that night in March.<sup>131</sup> That was the sole charge jurors were allowed to consider, not whether the officers committed murder or manslaughter.<sup>132</sup>

Cameron also did not initially disclose that wanton endangerment was the only charge he presented to jurors.<sup>133</sup> And after a judge ordered that he release the grand jury recordings, many argued that he heavily relied on witnesses that supported the officers' version of the events.<sup>134</sup> Further, after a juror argued before a judge that all recordings, transcripts, and files relating to the grand jury proceedings be released, Cameron filed a motion to prevent the juror from speaking publicly about the case, citing irreversible alterations to Kentucky's legal system.<sup>135</sup> And though his behavior was neither illegal, nor out of the ordinary for prosecutors, Cameron's actions alarmed the community who was incredulous to find out that the in the eyes of the criminal justice system, no one killed Breonna Taylor.<sup>136</sup>

<sup>130</sup> Bran Schrade, *Former Brunswick District Attorney General Focus of Grand Jury Probe*, ATLANTA JOURNAL-CONSTITUTION (June 18, 2021), <https://www.ajc.com/news/crime/former-brunswick-district-attorney-focus-of-grand-jury-probe/5D3R3VSIIDFD7NEKXPT5DVAWI2E/>.

<sup>131</sup> Fabiola Cineas, *The Breonna Taylor Case Proves That Prosecutors Have Too Much Power*, VOX.COM (Oct. 14, 2020), <https://www.vox.com/21514887/breonna-taylor-daniel-cameron-prosecutor>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

The policies and procedures practiced by the above-mentioned sectors of the court are in unmistakable conflict with the principles of human dignity in that courts, and all those associated, categorically fail to value each individual's intrinsic value in a number of ways. Here, the absence of dignity is masked by the sanitized process. Judges are not physically holding their knees on the necks of defendants, but rather contributing to their overall mental and emotional strangulation by ignoring individual circumstances and doling out severe sentences to petty offenders outside of the scope of their authority, among other things.

### c. The Correctional System

Millions of Americans are incarcerated in overcrowded, violent, and inhumane jails and prisons that do not provide adequate treatment, education, or rehabilitation.<sup>137</sup> Incarcerated people are beaten, stabbed, raped, and killed at an alarming rate in facilities run by corrupt officials who infrequently face consequences.<sup>138</sup> Those who are not physically assaulted bare witness, and suffer trauma as a result.<sup>139</sup> The number of mentally ill prisoners has soared dramatically as mental institutions have shuttered throughout the nation.<sup>140</sup> It is estimated that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have a mental health problem.<sup>141</sup> Additionally, those in solitary confinement are subjected to strict isolation for twenty-three hours a day.<sup>142</sup> The prison conditions criticized by the Court in *Hutto v.*

<sup>137</sup> *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> (last visited Oct. 26, 2021).

<sup>138</sup> *Id.*

<sup>139</sup> Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/>.

<sup>140</sup> Nilsen, *supra* note 7 at 11.

<sup>141</sup> KiDeuk Kim, Miriam Becker-Cohen & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, URBAN INST. (Apr. 7, 2015), <https://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system>.

<sup>142</sup> Nilsen, *supra* note 7, at 111.

*Finney* four decades ago—the reality of solitary confinement, inmate safety and health, crowded sleeping arrangements, and increased violence—have all only worsened.<sup>143</sup>

The American criminal justice system has a high tolerance for degradation generally, but nowhere is that tolerance more odious than in its prisons. Even a brief survey of the ways that the correctional system violates human dignity would be an article unto itself. Here, since the purpose of this article is not to illuminate the countless ways that the corrections system currently violates notions of dignity, but rather to indict the system in order to proffer small but meaningful solutions, this portion will discuss broader themes.

It could be said that the very existence of the carceral state as an institution is violative of human dignity because its very purpose is to deprive an individual of liberty and autonomy; two principles oft associated with human dignity. Pursuing this line of thought to its logical conclusion, it follows that the carceral state would need to be abolished in order to be more cognizant of individual dignity. Though the dignitarian’s case for abolition is readily made, that argument will not be made here. The current conditions of confinement demand expediency.

For example, in 2019 the Justice Department’s Civil Rights Division released a summary of its investigation of Alabama’s state prisons for men.<sup>144</sup> The overarching issues examined in the report depict an image of the American prison system generally; overcrowding contributes to serious harm; “severe understaffing” exposes prisoners to harm; prisoners are not adequately protected from violence; there is a lot of death; there is a lot of rape; there is not enough supervision.<sup>145</sup>

<sup>143</sup> Nilsen, *supra* note 7, at 124.

<sup>144</sup> United States Department of Justice Civil Rights Division, *Investigation of Alabama’s State Prisons for Men*, DEP’T OF JUST. (Apr. 2, 2019), [https://www.splcenter.org/sites/default/files/documents/doj\\_investigation\\_of\\_alabama\\_state\\_prisons\\_for\\_men.pdf](https://www.splcenter.org/sites/default/files/documents/doj_investigation_of_alabama_state_prisons_for_men.pdf).

<sup>145</sup> *Id.* at 2.

The investigation revealed that an excessive amount of violence, sexual abuse, and prisoner deaths occur on a regular basis within Alabama's prisons such that there is reasonable cause to believe that there is a pattern and practice of Eighth Amendment violations throughout the system.<sup>146</sup> The details of these excesses are gruesome. During one week of observation, one prisoner was stabbed repeatedly and left to bleed out, one was severely beaten with a sock filled with metal locks, one was set on fire in his sleep.<sup>147</sup> Another prisoner had been dead for so long that when he was discovered lying face down, his face was flattened. The assailants had also urinated on him and carved gang-related numbers into his ribcage.<sup>148</sup>

Other damning investigations exposed similarly lamentable conditions. One report by Oregon Public Broadcasting, KUOW, and the Northwest News Network found that at least 306 people died in Northwest jails since 2008; a number which was previously unknown because Oregon and Washington did not comprehensively track the deaths in the county jails.<sup>149</sup> At least 70 percent of those deaths were of inmates who were awaiting trial at the time of the deaths.<sup>150</sup> Four hundred and twenty-eight prisoners died in Florida prisons in 2017.<sup>151</sup> In Mississippi, 16 people died in one month.<sup>152</sup>

Women's prisons are plagued with the same structural deficiencies as men's prisons which leads to their categorical degradation. Incarcerated women are 30 times more likely to be

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<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 15.

<sup>149</sup> Conrad Wilson, Tony Schick, Austin Jenkins & Sydney Brownstone, *Booked and Buried: Northwest Jails' Mounting Death Toll*, OPB (Apr. 2, 2019), <https://www.opb.org/news/article/jail-deaths-oregon-washington-data-tracking/>.

<sup>150</sup> *Id.*

<sup>151</sup> Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), <https://newrepublic.com/article/153473/everyday-brutality-americas-prisons>.

<sup>152</sup> Jon Schuppe & Teresa Frenzel, *16 Prisoners Died in One Month in Mississippi. Their Families Want to Know Why.*, NBC NEWS (Sept. 18, 2018), <https://www.nbcnews.com/news/us-news/15-prisoners-died-one-month-mississippi-their-families-want-know-n905611>.

raped than women who are not incarcerated. Many of these rapes are committed by staff.<sup>153</sup> The stories are harrowing. There are many examples of guards using their privilege and access to coerce vulnerable prisoners to submit to sexual abuse in exchange for protection that never comes.<sup>154</sup>

Children held at youth detention facilities face similar conditions. Sexual abuse of incarcerated children, including by staff is widespread and commonplace.<sup>155</sup> The Bureau of Justice Statistics released a report in 2018 revealing that over 7 percent of incarcerated children reported to being sexually abused in the previous year.<sup>156</sup> A class action involving men and women who were held at a New Hampshire youth detention facility alleged that they experienced physical, sexual, and emotional abuse while incarcerated at the facility.<sup>157</sup> The lead plaintiff said he was repeatedly raped by two men who worked as counselors at the detention center when he was incarcerated there in the late 1990s.

An increased reliance on long-term isolation, or solitary confinement, as a means of behavioral control has exacerbated the already substandard prison conditions. Though at one point the practice was regarded to be unacceptably cruel and ineffective, solitary confinement roared to prominence as a result of decades of “tough on crime” politics and the construction of supermax prisons.<sup>158</sup> At least 61,000 people on any given day are in solitary confinement across

<sup>153</sup> Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, THE NATION (Mar. 2, 2015), <https://www.thenation.com/article/archive/why-americans-dont-care-about-prison-rape/>.

<sup>154</sup> *Id.*

<sup>155</sup> Vaidya Gullapalli, *Sexual Abuse in Youth Detention Facilities*, THE APPEAL (Jan. 13, 2020), <https://theappeal.org/sexual-abuse-in-youth-detention-facilities/>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX.COM (Apr. 17, 2019), <https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform>.

the country, where they are forced to spend 23 hours each day in cramped cells.<sup>159</sup> When people are let out, it is into small, solitary outdoor cages with no recreational equipment.<sup>160</sup> Some go years without seeing the sky.<sup>161</sup> Like the rest of the criminal justice system, those subjected to this extreme treatment are disproportionately young men of color.<sup>162</sup> While most spend a few months in it, thousands have been in solitary confinement for six years or more; some for decades.<sup>163</sup> In a suit about the isolation unit of New York's Clinton State Prison at Dannemora, the Second Circuit quoted the plaintiff's description of the strip-cell in which he had been placed:

[T]he said solitary confinement cell wherein plaintiff was placed was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon; plaintiff was without clothing and entirely nude for several days [elsewhere said to be 11 days] until he was given a thin pair of underwear to put on; plaintiff was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils therefore; plaintiff was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore; the

<sup>159</sup> Joshua Manson, *How Many People are in Solitary Confinement Today*, SOLITARY WATCH, <https://solitarywatch.org/2019/01/04/how-many-people-are-in-solitary-today/> (last visited Oct. 30, 2021); see also Wykstra, *supra* note 158.

<sup>160</sup> Wykstra, *supra* note 158.

<sup>161</sup> Eli Hager, *My Life in the Supermax*, THE MARSHALL PROJECT (Jan. 8, 2016), <https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax>.

<sup>162</sup> Wykstra, *supra* note 158.

<sup>163</sup> Wykstra, *supra* note 158.

windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing plaintiff to be exposed to the cold air and winter weather without clothing or other means of protecting himself or to escape the detrimental effects thereof; and the said solitary confinement cell was used as a means of subjecting plaintiff to oppression, excessively harsh, cruel and inhuman treatment specifically forbidden by the Eighth Amendment to the United States Constitution.<sup>164</sup>

The United Nations special rapporteur on torture, Juan E. Méndez, deemed the practice a form of torture.<sup>165</sup> Further, the UN's Mandela Rules dictate that it should never be used with youth and those with mental or physical disability or illness, or for anyone for more than 15 days.<sup>166</sup> Méndez's survey of the practice around the world revealed that "the United States uses solitary confinement more extensively than any other country, for longer periods, and with fewer guarantees."<sup>167</sup> Like other forms of torture, solitary confinement has a negative impact on people far beyond the time spent in isolation.<sup>168</sup> One researcher found that segregated prisoners are "utterly dysfunctional when they get out" and family members of recently released individuals often seek his assistance.<sup>169</sup>

Degradation and dehumanization are two unspoken purposes of punishment in the American prison system. Even without violence, the American prison experience is particularly harsh. Guards throw the handcuffed and chained prisoners' belongings into a pile and order them

<sup>164</sup> Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 281 (2020) (quoting *Wright v. McMann*, 387 F.2d 519, 521 (2d Cir. 1967)).

<sup>165</sup> *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UNITED NATIONS (Oct. 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>166</sup> Wykstra, *supra* note 158.

<sup>167</sup> Wykstra, *supra* note 158.

<sup>168</sup> Nilsen, *supra* note 7, at 129-30.

<sup>169</sup> Nilsen, *supra* note 7, at 130.

to clean up the mess.<sup>170</sup> Complaints about particular cellmates resulted in the complainant being assigned more violent cellmates.<sup>171</sup> For a long time, prisons were able to transfer inmates without cause or hearing, to a remote part of the state or even farther to keep them away from friends and family.<sup>172</sup> Prison officials may prevent a prisoner from seeing his child, or deny visitors altogether if the inmate has broken a rule.<sup>173</sup> Prisoners lose their worldly connections and the ability to make their own choices. They lose their identity, particularly in prisons where the corrections staff refer to them by institutionalizing terms like “prisoner,” “inmate,” or “tans.”<sup>174</sup> Their ability to maintain basic hygiene is severely diminished, particularly for those who menstruate.<sup>175</sup>

But the dehumanization does not end when incarceration does. In the American criminal justice system, federal and state legislatures have made it such that formerly incarcerated people are always relegated to a model of second-class citizenship. To give a cursory overview of some of the vast network of barriers that formerly incarcerated individuals face, there are more than 40,000 consequences in the United States that can attach after an individual leaves prison.<sup>176</sup> On average, 750 consequences are imposed by state and territorial law in each jurisdiction.<sup>177</sup> There are an additional 950 consequences imposed by federal law that apply in every jurisdiction.<sup>178</sup> These consequences include: ineligibility for public and government-assisted housing, public

<sup>170</sup> Nilsen, *supra* note 7, at 130.

<sup>171</sup> Nilsen, *supra* note 7, at 130.

<sup>172</sup> Nilsen, *supra* note 7, at 131.

<sup>173</sup> Nilsen, *supra* note 7, at 131.

<sup>174</sup> Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Reimagining Prison Web Report*, VERA INSTITUTE (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/human-dignity-as-the-guiding-principle> [hereinafter *Prison Web Report*].

<sup>175</sup> *Id.*

<sup>176</sup> *After the Sentence, More Consequences: A National Snapshot of Barriers to Work*, COUNCIL OF ST. GOVERNMENTS JUST. CTR, at 2 (Jan. 2021), <https://csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-snapshot/> [hereinafter “*Consequences*”].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

benefits, and various forms of employment.<sup>179</sup> Collateral consequences restrict access to occupational licenses needed to work in certain fields and business licenses needed to pursue self-employment.<sup>180</sup> They make some ineligible for some educational loan or grant benefits and driver's licenses.<sup>181</sup> Many states do not allow formerly incarcerated people to vote. More than 80 percent of these consequences attach indefinitely.<sup>182</sup> These consequences have the biggest impact on minorities.<sup>183</sup>

If abolition permits the sacrifice of those presently suffering in exchange for the success of a particular agenda, the sanctity of the movement is negated. Expediency is crucial; the millions subjected to the unimaginable cruelty of the system cannot wait for a legislative miracle. And even if that legislative miracle were to take place, it would take months, years even, to disentangle the vast network of prisons and jails from the criminal justice system; even longer to unlearn the ways of thinking that led to it. As Marie Gottschalk explained in her book *Caught: The Prison State and the Lockdown of American Politics*, the American carceral system is more impervious to change than most people imagine.<sup>184</sup> Therefore, the two forces of long-term visions and near-term efforts must work in tandem for the best chance at alleviating at least some of the suffering taking place in America's prisons.

### III. What Dignity Requires Immediately

All conceptions of the principle of human dignity mandate criminal justice reform in the United States. No matter the formulation of its requirements, its tenets, or the skepticism of the

<sup>179</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (May 2010).

<sup>180</sup> *Consequences*, *supra* note 176, at 2.

<sup>181</sup> Nilsen, *supra* note 7, at 137.

<sup>182</sup> *Consequences*, *supra* note 176 at 4.

<sup>183</sup> Nilsen, *supra* note 7, at 135.

<sup>184</sup> Allegra McLeod, *Review Essay: Beyond the Carceral State, Caught: The Prison State and the Lockdown of American Politics*, 95 TEX. L. REV. 651 (2017).

term's usefulness to human rights discourse, human beings have an innate understanding of what dignity is not. This is what has helped to guide the term to the center of modern human rights discourse and what has allowed it to provide an internationally accepted framework for the normative regulation of political life.<sup>185</sup> The violation of an individual's dignity triggers such a visceral response in most that it feels almost evolutionary; as if humanity has evolved to recognize, and want to avoid, certain types of treatment even if that treatment is not life threatening. Here, the discussion that pervades philosophical discourse on the topic of human dignity, mainly its meaning and affirmative grants, is not dispositive in order to determine what dignity requires, though it is relevant. The nuances of that conversation, and the virtues it implicates (autonomy, responsibility, rationality, liberty, etc.), have no bearing on whether human beings should have to suffer prison rapes, for example: even if dignity is a redundant term for autonomy as many scholars, like Ruth Macklin, suggest.<sup>186</sup> This paper seeks to illuminate abundantly clear violations of dignity in order to advocate for reform that restores basic humanity to the criminal justice system. The suggested reforms will be outlined in this section and addressed by each component part of the criminal justice system discussed above: law enforcement, the courts, and the correctional system. Some attention will be given to post-release factors, which relegate the formerly incarcerated to a second-tier caste. However, because that reform would rely on federal and state government action, it is not the kind of immediate action advocated for by this paper.

#### **a. Law Enforcement**

Calls to reform policing, or abolish it altogether, have never been as loud and seemingly unanimous as they were in the wake of the public execution of George Floyd in the summer of

<sup>185</sup> MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 1 (2012).

<sup>186</sup> *Id.* at 5.

2020. Polls suggest that about 15 million to 26 million people in the United States participated in demonstrations in the early weeks of June.<sup>187</sup> In some places, the public outcry led to political action. Cities across the country cut funding to police departments. For example, the Los Angeles Budget Committee approved reallocating \$133 million from the LAPD budget to other areas; a direct response to the rallying cry “defund the police” which echoed through city streets throughout most of last year.<sup>188</sup> Thirty-one of the country’s 100 largest cities passed policies restricting the use of chokeholds by law enforcement.<sup>189</sup> Breonna’s Law was passed in Louisville, Kentucky banning the kind of “no-knock” warrant that led to Breonna Taylor’s murder.<sup>190</sup> Cities began enacting and strengthening “duty-to-intervene” policies, which require officers to step in when their colleagues use excessive force.<sup>191</sup>

While these reforms are necessary, there is still a significant amount of work to be done to further inject dignity into the relationship between law enforcement and the people they are meant to protect. Though there are significant barriers to sweeping change, namely police unions, Michael German’s suggestions regarding what is necessary to tackle white supremacy in policing does not implicate the kind of bureaucratic overall that many seeking police reform demand. German suggests that all law enforcement agencies do the following: recruit more people of color, establish clear policies regarding participation in white supremacist organizations and other far-right groups, and on overt and explicit expressions of racism with specificity, regarding tattoos, patches, and insignia, as well as social media posting; establish

<sup>187</sup> Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

<sup>188</sup> Jackie Menjivar, *Black Lives Matter Protests: What’s Been Achieved So Far*, DoSomething.Org (Aug. 13, 2020), <https://www.dosomething.org/us/articles/black-lives-matter-protests-whats-been-achieved-so-far>.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

mitigation plans when biased officers are detected; create reporting mechanisms to ensure evidence of overtly racist behavior by a police officer is provided to prosecutors; encourage whistleblowing and protect whistleblowers.<sup>192</sup> German further suggests that the federal government establish a public hotline for reporting racist activity by law enforcement officials, strengthen whistleblower protections for federal law enforcement agents, and create a national database of police misconduct records.<sup>193</sup> Dozens of advocates argue for better, more consistent, de-escalation training or training that encourages future law enforcement to show empathy and “leave everyone they encounter ‘with their dignity still intact.’”<sup>194</sup>

Certainly, more comprehensive changes must be made to successfully alter the relationship that police have with their communities. Many of those efforts, *e.g.*, amending 18 U.S.C. § 242, will take more time than black communities have to give and therefore must be worked on in the background while more readily solvable issues press on in the fore.

#### **b. The Courts**

Changing any facet of the court system tends to require legislative or executive action, making expediency difficult to achieve due to the current political climate. For example, appointing more diverse judges to the federal bench requires a progressive political appetite from both the president and the Senate; something the United States has not possessed for several years. Further, without legislative or presidential intervention, the ideological make-up of the current Supreme Court will likely be a hinderance for the advancement of dignity in Eighth Amendment jurisprudence. Additionally, much of what makes interactions with judges or their

<sup>192</sup> German, *supra* note 40.

<sup>193</sup> German, *supra* note 40.

<sup>194</sup> Rosa Brooks, *Stop Training Police Like They’re Joining the Military*, THE ATLANTIC (June 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/>; *see also* Alana Semuels, *Society is Paying the Price for America’s Outdated Police Training Methods*, TIME (Nov. 20, 2020), <https://time.com/5901726/police-training-academies/>.

court rooms so undignified is mandated by discretion-limiting statutes or predetermined by other actors in the system like prosecutors or law enforcement.

Prosecutorial reform is one area where there is room for expediency, particularly federal prosecutors, who must abide by guidance provided by the U.S. Attorney General. Today, reforming the behavior of federal prosecutors could be achieved through a charging and sentencing memorandum; one that seeks to further dignity into prosecutorial decision-making, akin to Eric Holder's memo, issued in May 2010.<sup>195</sup>

Many advocates have highlighted the metrics of success as one of the ways to reform the position.<sup>196</sup> If success means acquiring a certain number of convictions, longer sentence lengths, or lower crime rates, then prosecutors would shape their behavior in a way to achieve those ends. If prosecutors were focused on metrics that actually reflect the health and well-being of the community, they would be forced to make different decisions. In 2017, researchers from Florida International University and Loyola University of Chicago deployed a tool known as Prosecutorial Performance Indicators which seeks to collect data in order to redefine what success in prosecution looks like. This tool is a dashboard of 55 indicators each assessing prosecutorial progress on a monthly or quarterly basis toward achieving three broad goals: capacity and efficiency, community safety and well-being, and fairness and justice.<sup>197</sup> In practice, this tool helps prosecutors understand trends and identify red flags in order to implement equitable solutions for their communities. More prosecutor's offices around the country should deploy this tool.

<sup>195</sup> Attorney General Eric J. Holder Jr., *Department Policy on Charging and Sentencing*, DEP'T OF JUST. (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

<sup>196</sup> Melba Pearson, *The Data That Can Make Prosecutors Engines of Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Nov. 23, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/data-can-make-prosecutors-engines-criminal-justice-reform>.

<sup>197</sup> *Id.*

Since prosecutors have nearly unfettered discretion, they have the ability to acknowledge their own fallibility and shape policies in a way that takes dignity into consideration. The Institute for Innovation in Prosecution at John Jay College (“IIP”) put together a report outlining a series of changes prosecutors’ offices should make in order to assess and improve their internal culture.<sup>198</sup> Some of their suggestions include: increasing staff exposure to communities most affected by the criminal legal system; normalizing the notion that prosecutors are fallible; requiring participation in policy research and policymaking from junior and senior attorneys; hiring from the community; and regularly communicating office goals, policy positions, and successful uses of non-incarceratory dispositions through the head prosecutor.<sup>199</sup> These reforms are meant to guide prosecutors out of an era of relying on “outdated notions for achieving public safety” and away from a “culture that rewards achieving convictions.”<sup>200</sup>

If the changes to other arms of the criminal justice regime are made with expediency, dignity may just trickle into our courtrooms. This is not to say that court reform is a lost cause, but rather to highlight that this arm of the criminal justice system mandates investment in long-term visions if substantive change is to take place. Revolutionary thinking will be necessary.

### c. The Correctional System

A report published by the Vera Institute outlined several ways the correctional system could be reformed with human dignity as an organizing principle. The report proclaims that “[h]uman dignity is a rejoinder to the persistent dehumanization that characterizes current and historic incarceration.”<sup>201</sup> The drafters of this report assume that any consideration of the principle of

<sup>198</sup> Ethan Lowens, Rena Paul & Jonathan Terry, *Prosecutorial Culture Change: A Primer*, INST. FOR INNOVATION IN PROSECUTION (2020), <https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5feb710347ceb21aac5ca43f/1609265420240/IIP+Prosecutorial+Culture+Change+FINAL.pdf>.

<sup>199</sup> *Id.* at 3.

<sup>200</sup> *Id.* at 1.

<sup>201</sup> *Prison Web Report*, *supra* note 175.

dignity would affect all aspects of imprisonment, from its purpose to the experience of everyday life in confinement.<sup>202</sup> This paper argues that the criminal justice system more broadly would be significantly altered if dignity was considered. As the Vera Institute report states, “[w]here we have denied humanity, we must embrace human dignity.”<sup>203</sup>

The Vera Institute report is divided into three principles intended to help elucidate what a dignity-centered approach to prisons may mean in practice: (1) respect the intrinsic worth of each human being; (2) elevate and support personal relationships; and (3) respect a person’s capacity to grow and change.<sup>204</sup>

Some suggestions under the first enumerated principle are as follows: requiring corrections staff to call incarcerated people by their names; permitting incarcerated people to make individual choices about their attire or offering variety in institutionally assigned clothing; prohibiting uniforms intended to degrade, such as pink boxer shorts or tight, white, transparent uniforms.<sup>205</sup> Further, the report argues that prisons should provide an adequate supply and variety of hygienic products that are of normal quality; supply incarcerated people who menstruate with adequate supply and choice of sanitary products; serving an adequate quantity of edible and healthy food; encouraging corrections staff and incarcerated people to view each other as humans worth getting to know beyond the guard-inmate paradigm.<sup>206</sup>

Reforms targeting the elevation of personal relationships are as follows: allowing a generous number of visits for reasonable durations of time; permitting physical contact between partners or parents and their children; creating policies that ensure all visitors are treated respectfully and

<sup>202</sup> *Prison Web Report*, *supra* note 175.

<sup>203</sup> *Prison Web Report*, *supra* note 175.

<sup>204</sup> *Prison Web Report*, *supra* note 175.

<sup>205</sup> *Prison Web Report*, *supra* note 175.

<sup>206</sup> *Prison Web Report*, *supra* note 175.

fairly; making phone calls, emails, and video calls available to incarcerated people at reasonable rates.<sup>207</sup>

Reforms targeting the third principle are as follows: supplying up-to-date reading material, including newspapers, textbooks, legal information, and recreational nonfiction and fiction books; allowing incarcerated people to form clubs or affinity groups to share hobbies and discuss issues or interest; engaging incarcerated people in the creation and enforcement of in-unit rules.

Many of the additional reforms suggested by the Vera Institute would require massive bureaucratic overalls—e.g., implementing compassionate release programs, developing fair and transparent internal grievance and complaint processes; allowing incarcerated people to exercise their right to vote<sup>208</sup>—and are thus, not the type of reform advocated for in this paper but are crucial to the protection of human dignity all the same.

The small incremental changes advocated for above will not be able to account for every failure in the system. In fact, it is not likely that any set of reforms would be able to solve all that ails the broken American system. Prisons, and the entire criminal justice system more broadly, are a cornerstone of our society.<sup>209</sup> As a result, true substantive change can only come once the electorate relearns its relationship with punishment and votes with that understanding in mind.

#### **d. Collateral Consequences**

Some attention must also be given to the unending web of collateral consequences that tangle the formerly incarcerated in perpetuity, if only to acknowledge that this too is the type of reform that would be mired in the bowels of American bureaucracy for an unacceptable amount of time.

<sup>207</sup> *Prison Web Report*, *supra* note 175.

<sup>208</sup> *Prison Web Report*, *supra* note 175.

<sup>209</sup> Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Criminal Law: Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 353 (2021).

Nonetheless, the United States should reshape its collateral consequences in a manner that best positions them to become productive contributors to their families and communities.<sup>210</sup>

Professor Michael Pinard suggests that the U.S. should aim to implement measures that enhance the dignity interests of individuals with criminal records by removing unnecessary legal impediments to reentry and ultimately promoting their standing in the community.<sup>211</sup> Further, the United States should tailor any collateral consequences to the underlying offense by imposing only those consequences that directly relate to the underlying criminal conduct and are therefore necessary to minimize the risk of additional harm.<sup>212</sup>

Additionally, Professor Pinard suggests that jurisdictions implement mechanisms, like those suggested by the American Bar Association (ABA), to alleviate the legal penalties that accompany a criminal record.<sup>213</sup> The ABA's proposal organizes collateral consequences into categories and suggests new infrastructure to help individuals relieve themselves of the consequences.<sup>214</sup> Professor Pinard also suggests that the U.S. analyze the racially disproportionate impact of collateral consequences by implementing measures similar to those adopted in Canada, which are discussed later, and by requiring racial and ethnic impact statements for any newly proposed expansions of federal or state collateral consequences.<sup>215</sup>

#### IV. International Comparisons

<sup>210</sup> Pinard, *supra* note 179, at 525.

<sup>211</sup> Pinard, *supra* note 179, at 525.

<sup>212</sup> Pinard, *supra* note 179, at 528.

<sup>213</sup> Pinard, *supra* note 179, at 530.

<sup>214</sup> Pinard, *supra* note 179, at 530.

<sup>215</sup> Pinard, *supra* note 179, at 532-33.

In other Western Democracies, dignity plays a more significant role in the shaping of their criminal justice system and its impact is reflected in the length of their sentences, the conditions of their prisons, and their consciousness of racial biases.

In his book *Harsh Justice: Criminal Punishment and the Widening Divide between America and England*, legal historian James Whitman argued that the source of this cultural difference can be attributed to America's understanding of status as compared to Europe's.<sup>216</sup> To summarize, Whitman posits that the contours of punishment in society follow the hierarchal ordering of that society (e.g., the lowest rank in Europe would be hanged, while nobility was beheaded).<sup>217</sup> Since America lacked a formal caste, it did not develop an ordering of punishments, enabling a sort of generalized culture of cruelty regardless of status.<sup>218</sup> Professor Trevon Rosson's note on Whitman's thesis explained: "[w]here aristocratic traditions in France and Germany encouraged the generalization of dignified and benevolent punishment, the absence of those traditions in America" inhibited the its ability to envision a less degrading system of punishment.<sup>219</sup>

Whitman also identified the insidious nature of "vox populi" in democratic politics as a source of harshness in the U.S. criminal justice system.<sup>220</sup> In America there is a "populist and demagogic tradition" that encourages politicians to be tough on crime and to punish aggressively.<sup>221</sup> "A politician in America who is soft on crime is a politician without a job."<sup>222</sup> In comparison, countries like Germany and France have insulated the process of punishment from the world of politics by building strong bureaucracies that regulate the punishment policies.<sup>223</sup>

<sup>216</sup> Trevon Rosson, *Book Note: Harsh Justice: Criminal Punishment and the Widening Divide between America and England* by James Whitman, 31 AM. J. CRIM. L. 317, 321 (2004).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 333.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 332.

To Whitman, recognition that the origin of America's marked cruelty stretches beyond the purposes of punishment may help remove obstacles in ideological discussion and clear the pathways of reform.<sup>224</sup> Though imperfect, drawing inspiration from other democracies should persuade legislators in our own government to implement certain policies. This section will briefly review differences in policies in Germany, France, Canada, and South Africa.

### *Germany*

In Germany, where human dignity is enshrined in its constitution, imprisonment is a last resort.<sup>225</sup> Article I of Germany's Basic Law declares that "the dignity of man is inviolable" and imposes a duty on state authority to respect and protect it.<sup>226</sup> Further, Germany has incorporated crucial human rights documents that refer to dignity as a foundational principle, e.g., the Universal Declaration of Human Rights (UNDHR) and the International Covenant on Civil and Political Rights (ICCPR), into its national constitution and national laws and continue to reinforce the proclamations contained therein as new generations of human rights instruments are drafted.<sup>227</sup> As a result, prison sentences are short and life in prison approximates life on the outside as much as possible.<sup>228</sup> Prisons offer real jobs to inmates, with pay and vacation.<sup>229</sup> They are often not required to wear uniforms and are addressed respectfully by correctional staff.<sup>230</sup> Privacy is protected; there are no bars on the doors.<sup>231</sup> And though the description is perhaps aspirational, as noted by Professor James Whitman in his study of French and German practices,

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<sup>224</sup> *See generally id.*

<sup>225</sup> Nilsen, *supra* note 7, at 161.

<sup>226</sup> Nilsen, *supra* note 7, at fn. 25.

<sup>227</sup> *Doing the Right Thing*, *supra* note 26, at 9.

<sup>228</sup> Nilsen, *supra* note 7, at 161.

<sup>229</sup> Nilsen, *supra* note 7, at 161.

<sup>230</sup> Nilsen, *supra* note 7, at 161.

<sup>231</sup> Nilsen, *supra* note 7, at 161.

the German code reveals its overall intent. “The lives of convicts are supposed to be, as far as possible, no different from the lives of ordinary German people.”<sup>232</sup>

### *France*

Mapping the French system onto the American system would be difficult to achieve, though some scholars argue that the “legal cultural gap between the French and American systems is not as great as some comparative researchers have supposed.”<sup>233</sup> However, one technique that might prove useful and easily implemented is the way in which police, prosecutors, and judges are selected, trained, and supervised.

Whereas institutions in the United States are structured to be supervised by local groups, French institutions are subject to nationwide standards.<sup>234</sup> While a national police hierarchy would not be workable in the U.S. federal system, a set of national police standards addressing model training programs and supervision styles, with a database on misconduct is certainly feasible. Professor Richard Frase suggests that reformers of the American system also seriously consider the adoption of legislation requiring supervisory-level approval for certain critical police actions like undercover operations, warrantless, non-exigent arrests in public places; line-ups and other identification procedures not subject to the right-to-counsel safeguards; and prolonged custodial interrogation.<sup>235</sup>

Additionally, French prosecutors are subject to a more rigorous and centralized training program which may better prepare them for their role. The normal path of entry into the profession in France into either branch of the magistrate (judges and prosecutors) is through a

<sup>232</sup> Nilsen, *supra* note 7, at 162 (quoting JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 8 (2003)).

<sup>233</sup> Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It?*, 78 CALIF. L. REV. 542, 552 (1990).

<sup>234</sup> *Id.* at 553.

<sup>235</sup> *Id.* at 557.

24-month training program which guide them through the system, exposing them to a bird's eye view of the mechanisms operating the system before expecting them to perform.<sup>236</sup>

### *Canada*

One of the most consequential ways the Canadian criminal justice system differs from the system in the United States is in its emphasis on proportionality review. Scholars argue as to whether the principle of proportionality exists in the U.S. Constitution, in Canada, however, the principle is explicitly adopted as a part of its constitution, the Charter of Rights and Freedoms.<sup>237</sup> The provision states that the rights guaranteed in the constitution are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>238</sup> This review functions as an additional check to governmental overreach.

In practice, proportionality review is a balancing test between government authority to act and a generous understanding of the rights guaranteed by the Canadian constitution. For example, in *R. v. Smith*, the Canadian Court held a mandatory minimum of seven years for all offenses involving the distribution of narcotics to be grossly disproportionate because it applied regardless of distinctions in degrees of seriousness in the offense.<sup>239</sup>

In structured proportionality review, the relative importance of rights and values at stake can be distinctly evaluated and the test has proven to be a stable framework across various controversial issues.<sup>240</sup> In the United States, when proportionality review is present, the Supreme Court treats it as if it were a discrete and disconnected theory every time it is employed.<sup>241</sup>

<sup>236</sup> *Id.* at 562.

<sup>237</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3110 (2015).

<sup>238</sup> Canadian Charter of Rights and Freedoms § 1, part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

<sup>239</sup> *Id.* at 3186.

<sup>240</sup> *Id.* at 3119.

<sup>241</sup> *Id.* at 3121.

Injecting structured proportionality review more forcefully into American jurisprudence may bring U.S. constitutional law closer to U.S. conceptions of justice.<sup>242</sup>

Canada has also gone beyond mere recognition of the historic and contemporary discrimination against Aborigines in its criminal justice system and implemented concrete steps to lessen racial disparities in incarceration.<sup>243</sup> In 1996, Canada codified a statute providing for the conditional sentence of imprisonment with “the express goal of reducing the use of incarceration as a sanction” in response to its disproportionate incarceration of Aborigines.<sup>244</sup> This statute provides that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances,” and requires judges to consider “all available sanctions other than imprisonment that are reasonable in the circumstances.”<sup>245</sup> Further, it mandates that judges pay “particular attention to the circumstances of aboriginal offenders.”<sup>246</sup> The Supreme Court of Canada interpreted this statute in *Regina v. Gladue*, finding that it is remedial because it directs “sentencing judges to undertake the process of sentencing aboriginal offenders differently in order to endeavor to achieve a truly fit and proper sentence in the particular case.”<sup>247</sup>

### *South Africa*

Though South Africans with criminal records face collateral consequences comparable to those in the United States, like prohibitions in certain fields of employment, they do enjoy certain constitutional rights that the formerly incarcerated in the United States do not.<sup>248</sup> Dignity is a foundational principle in the South African Constitution. The Bill of Rights requires that all

<sup>242</sup> *Id.* at 3194.

<sup>243</sup> Pinard, *supra* note 179, at 464.

<sup>244</sup> Pinard, *supra* note 179, at 517.

<sup>245</sup> Pinard, *supra* note 179, at 517.

<sup>246</sup> Pinard, *supra* note 179, at 518.

<sup>247</sup> [2002] 3 S.C.R. 519, 523 (Can.).

<sup>248</sup> Pinard, *supra* note 179, at 499.

individuals be treated with “inherent dignity” which has been invoked in various contexts.<sup>249</sup> In the criminal justice context, this dedication to dignity has materialized to protect voting rights of those with criminal records. For instance, in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*, the Constitutional Court declared unconstitutional a law that disenfranchised those sentenced to prison with the option of paying a fine instead of imprisonment due to the role that the right to vote has played in entrenching white supremacy.<sup>250</sup>

South Africa, like Canada, has also taken steps to thwart the lingering impact racial subjugation has had on its citizens by declaring it both relevant and central to determining certain legal claims.<sup>251</sup> For example, in his concurrence in *Brink v Kitshoff NO*, Justice O'Regan of the Constitutional Court states that the Equality Clause of South Africa's Constitution “needs to be interpreted” in light of apartheid's “systematic discrimination against black people in all aspects of social life” and “the enduring legacy that it bequeathed.”<sup>252</sup> Though the Supreme Court of the United States has recognized the nation's history of racial apartheid, it frequently fails to acknowledge the role it plays in society currently.<sup>253</sup>

## V. Conclusion

Respect for dignity requires immediate action on behalf of all who currently interact with the criminal justice system in America. Though many more meaningful efforts, such as legislation or court reform, mandate the kind of comprehensive overhaul that many scholars advocate for,

<sup>249</sup> Pinard, *supra* note 179, at 499.

<sup>250</sup> 2005 (3) SA 280 (CC) (S. Afr.).

<sup>251</sup> Pinard, *supra* note 179, at 518.

<sup>252</sup> Pinard, *supra* note 179, at 517 (quoting 1996 (4) SA 197 (CC) at 217 (S. Afr.) (O'Regan, J. concurring)).

<sup>253</sup> See *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating Section 4(b) of the Voting Rights Act of 1965 because it was based on a formula using 40-year-old facts that were not related to the present day).

small changes that can be immediately implemented will help reaffirm the humanity of those presently in the system. Any other style of reform does not take seriously their plight.

It is imperative that the mission to rectify the indignities of the system does not sacrifice those beholden to its violations today. Perfect recognition of human dignity is not defined, therefore perfection in reform is not attainable. Most can recognize certain behaviors as blatantly disrespectful to our shared humanity. We have an obligation to alleviate the suffering of those being violated. Modest reform efforts must demand our immediate attention.

## Applicant Details

First Name	Stayce		
Last Name	Evans		
Citizenship Status	U. S. Citizen		
Email Address	<a href="mailto:stayce.evans@law.bison.howard.edu">stayce.evans@law.bison.howard.edu</a>		
Address	<table> <tr> <th>Address</th> </tr> <tr> <td> <b>Street</b>  <b>1155 Ripley Street</b>  <b>City</b>  <b>Silver Spring</b>  <b>State/Territory</b>  <b>Maryland</b>  <b>Zip</b>  <b>20910</b>  <b>Country</b>  <b>United States</b> </td> </tr> </table>	Address	<b>Street</b> <b>1155 Ripley Street</b> <b>City</b> <b>Silver Spring</b> <b>State/Territory</b> <b>Maryland</b> <b>Zip</b> <b>20910</b> <b>Country</b> <b>United States</b>
Address			
<b>Street</b> <b>1155 Ripley Street</b> <b>City</b> <b>Silver Spring</b> <b>State/Territory</b> <b>Maryland</b> <b>Zip</b> <b>20910</b> <b>Country</b> <b>United States</b>			
Contact Phone Number	4044922661		

## Applicant Education

BA/BS From	State University of West Georgia
Date of BA/BS	December 2015
JD/LLB From	Howard University School of Law
	<a href="http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=50906&amp;yr=2011">http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=50906&amp;yr=2011</a>
Date of JD/LLB	May 11, 2024
Class Rank	25%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	Yes
Moot Court Name(s)	Huver I. Brown Trial Advocacy Moot Court Team

## Bar Admission

## Prior Judicial Experience

Judicial  
Internships/        **Yes**  
Externships  
Post-graduate  
Judicial Law       **No**  
Clerk

## Specialized Work Experience

## Professional Organization

Organizations       **Just the Beginning Organization**

## Recommenders

Gavil, Andrew  
agavil@law.howard.edu  
202-806-8018

Whitesel, Nathaniel  
nkwhitesel@gmail.com

VanWye, Sarah  
SVanwye@law.howard.edu

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

**Stayce L. Evans**

Wheaton, MD 20902

stayce.evans@law.bison.howard.edu, 404-492-2661

Judge Jamar K. Walker  
600 Granby Street  
Norfolk, Virginia 23510

June 12, 2023

Dear Judge Walker:

I am a third-year student at Howard University School of Law. I write to apply for a clerkship in your chambers for the 2024–2025 term, or any subsequent term. I am interested in clerking for many reasons, but I will limit myself to three. First, as an aspiring trial lawyer, I want to learn practical litigation skills that can inform my career. Second, I enjoy legal research and writing, and I would appreciate that experience being the focus of my first post-graduation job. Last, as a young Black lawyer, the mentorship I will gain from a clerkship is immeasurable.

My professional and education experiences not only led me to my current summer associate position at Davis Polk & Wardell LLP but will also make me a successful clerk in your chambers. For five years before law school, I worked for a local court system in my home state of Georgia. There, I became extensively experienced with our case management system and worked closely with judges to manage the flow of various processes in the courtroom.

During my 1L summer, I interned with U.S. District Judge Reggie B. Walton in the District for the District of Columbia. I conducted legal research and drafted a memorandum opinion on civil asset forfeiture and the Freedom of Information Act which was ultimately published in the Federal Supplement.

As a 2L, I gained extensive on-your-feet lawyering skills which taught me how to quickly analyze issues and how to communicate better. For example, I served as a law clerk for the Public Defender Service for the District of Columbia in its Juvenile Services Program. I represented detained youth in delinquency hearings before an administrative law judge. I also served as a member of the Huver I. Brown Trial Advocacy Team, where my oral advocacy skills garnered my teammates and I regional champion honors in the Student Trial Advocacy Competition hosted by the American Association for Justice.

Enclosed are my résumé, transcripts, and a writing sample. My recommenders Professor Andrew Gavil, Professor Sarah VanWye, and Assistant U.S. Attorney Nathaniel Whitesel will email you their letters of recommendation directly. Please let me know if you need any additional information. Thank you for your time.

In Peace and Equity,

  
Stayce Evans

## Stayce L. Evans

Wheaton, MD

stayce.evans@law.bison.howard.edu, 404-492-2661

### EDUCATION

**Howard University School of Law**, Washington, D.C.

*Juris Doctor Candidate*

Expected May 2024

GPA/Ranking: 87.40/ Top 20%

Activities: Regional Champion–American Association for Justice 2023 Student Trial Advocacy Competition; Henry F. Ramsey Dean’s Fellow; Research Assistant–Professor Tiffany Williams Brewer; Contracts Teaching Assistant–Professor Alice Thomas; Vice President–Huver I. Brown Trial Advocacy Moot Court Team; Vice Chair–Orientation 2022

**The University of West Georgia**, Carrollton, GA

*Bachelor of Science, cum laude, in Criminology with a minor in Psychology*

December 2015

GPA: 3.5

### SELECTED LEGAL EXPERIENCE

**Davis Polk & Wardwell**, New York City, NY

*Summer Associate*

May 2023–Present

- Conduct legal research and prepare internal briefs on class certification, diversity jurisdiction, and statutory interpretation
- Develop presentation talking points and summarize a 500-page report on reparations into digestible material

**Public Defender Service for the District of Columbia**, Washington, D.C.

*Law Clerk, Juvenile Services Program*

August 2022–November 2022

- Represented detained youth in disciplinary, detention, and placement hearings before an administrative law judge
- Conducted confidential interviews and legal rights orientations for newly detained youth
- Assisted youth in drafting complaints on conditions of confinement to the oversight body of the juvenile detention facility

**United States District Court for the District of Columbia**, Washington, D.C.

*Judicial Intern to the Honorable Reggie B. Walton, Senior Judge*

May 2022–August 2022

- Conducted legal research and drafted memorandum opinions and bench memoranda on civil asset forfeiture, the Freedom of Information Act, and the Immigration and Nationality Act
- Peer reviewed memorandum opinions and judicial orders drafted by co-interns and law clerks in preparation for publication in the Federal Supplement
- Recorded notes for chambers discussions on status hearings, motion hearings, and trials before the Court

**Dekalb County Court System**, Decatur, GA

*Deputy Clerk III and Senior Tribunal Technician*

June 2015–May 2017 and November 2018–June 2021

- Drafted court orders, subpoenas, and other legal documents for the Judge’s review
- Prepared detailed notes of court proceedings, recorded the need for specific actions including child custody arrangements, and assigned parent attorneys
- Managed filings on civil and criminal actions including dispositions, commitment orders, and detention orders

### OTHER PROFESSIONAL EXPERIENCE

**Starbucks**, Atlanta, GA

*Shift Supervisor*

February 2018–November 2018

- Managed daily business activities and supervised a team of four to five employees per shift

**Teach For America**, New Orleans, LA

*Lead Teacher*

June 2017–September 2017

- Lead social studies classroom instruction for 20 to 30 seventh and eighth grade students

### COMMUNITY INVOLVEMENT AND INTERESTS

Habitat for Humanity | House Plants | Console Video Games | James Webb Space Telescope | Cycling

Howard University  
Washington, DC 20039

Student No:@03035897

Date Issued:25-MAY-2023 OFFICIAL

Record of : Stayce L Evans

Current Name:Stayce L Evans

\*\* Warning - No Address \*\*

Issued To : STAYCE EVANS

Course Level : Law

Current Program

Degree : Juris Doctor  
Program : Juris Doctor  
College : School of Law  
Campus : West/Law

Subj	No.	C	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:

Fall 2021

School of Law  
Law  
First-Time Professional

LAW	507	M	Leg. Reg.	3.00	88	264.00
LAW	617	M	Torts	4.00	86	344.00
LAW	619	M	Civil Procedure I	4.00	88	352.00

Earned Hrs	GPA-Hrs	QPts	GPA
11.00	11.00	960.00	87.27

Spring 2022

School of Law  
Law  
Continuing

LAW	612	W	Constitutional Law I	3.00	85	255.00
LAW	613	W	Legal Reasoning Research Writ	4.00	86	344.00
LAW	614	W	Property	4.00	89	356.00
LAW	615	M	Contracts	5.00	87	435.00
LAW	616	W	Criminal Law	3.00	83	249.00

Earned Hrs	GPA-Hrs	QPts	GPA
19.00	19.00	1639.00	86.26

Good Standing

Summer 2022

School of Law  
Law  
Continuing

LAW	580	M	Judicial Externship Exp	6.00	P	0.00
LAW	792	M	CD:Business Org	4.00	90	360.00

Earned Hrs	GPA-Hrs	QPts	GPA
10.00	4.00	360.00	90.00

Fall 2022

School of Law  
Law  
Continuing

LAW	551	M	CD: Capital Punishment	2.00	88	176.00
LAW	621	M	Constitutional Law II	3.00	87	261.00
LAW	654	M	Legal Writing II	2.00	90	180.00
LAW	680	M	Federal Courts	3.00	86	258.00

Earned Hrs	GPA-Hrs	QPts	GPA
10.00	10.00	875.00	87.50

Good Standing

Subj	No.	C	Title	Cred	Grade	Pts	R
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INSTITUTION CREDIT:

Spring 2023

School of Law  
Law  
Continuing

LAW	629	W	Evidence	4.00	89	356.00
LAW	642	W	Criminal Procedure I	3.00	85	255.00
LAW	698	W	CD: Supreme Ct Jurisprudence	3.00	88	264.00
LAW	727	W	Education Law	3.00	91	273.00
LAW	890	W	Trial Advocacy Moot Court	2.00	P	0.00

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	13.00	1148.00	88.31

Good Standing

Fall 2021

LAW	613	M	Legal Reasoning Research Writ	0.00	In Prog	Course
LAW	615	M	Contracts	0.00	In Prog	Course

Fall 2022

LAW	890	M	Trial Advocacy Moot Court	0.00	In Prog	Course
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Fall 2023

LAW	687	W	Professional Responsibility	3.00	In Prog	Course
LAW	689	M	Race, Law & Change	3.00	In Prog	Course
LAW	804	M	Criminal Justice Clinic Exp	6.00	In Prog	Course

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
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TOTAL INSTITUTION	65.00	57.00	4982.00	87.40
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TOTAL TRANSFER	0.00	0.00	0.00	0.00
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OVERALL	65.00	57.00	4982.00	87.40
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-----END OF TRANSCRIPT-----



# GRADING POLICY/GRADE CUT-OFFS

THE CURRENT GRADING POLICY AND GRADE CUT-OFFS FOR THE CLASSES OF 2023 AND 2024 ARE AS FOLLOWS:

OUT OF A SCALE OF 100

## CLASS OF 2023

Class Rank	Cum GPA
Top 10%	89.97-above
Top 15%	88.77-above
Top 25%	86.90-above
Top 33%	85.13-above

## CLASS OF 2024

Class Rank	Cum GPA
Top 10%	88.7-above
Top 15%	87.6-above
Top 25%	86.17-above
Top 33%	84.67-above

## FINAL GRADES SYSTEM

A	90-100
B	80-89
C	70-79
D	60-69
F	50-59

## 4-POINT SCALE CONVERSION

Cum GPA	Standard GPA
90-100	4.0
89-85	3.99 - 3.50
84-80	3.40 - 3.00
79-75	2.99 - 2.50
74-70	2.49 - 2.00
69-65	1.99 - 1.50
64-60	1.49 - 1.00
59-less	.99 - less

A J.D. student will be placed on academic probation if the student has a cumulative weighted grade point average between 72.00 and 74.99 after the end of the first year. A student who is on academic probation after the end of the first year must also participate in the upper-class Academic Support Program. Failure to participate in the Academic Support Program is grounds for dismissal. With the exception of the summer semester, probation shall terminate during the semester in which the student obtains a cumulative GPA of 75.



University of West Georgia  
Carrollton, Georgia

In accordance with the Family Educational Rights and Privacy Act of 1974 as Amended, this document may not be released to others without the written consent of the student.

REJECT DOCUMENT IF SIGNATURE BELOW IS DISTORTED

  
Donna K. Haley, Registrar

Date Issued: 25-MAY-2023  
Page: 2

Student No: 917-42-7408  
Record of: Stayce Laurice Evans

SUBJ NO.	CMP	COURSE TITLE	CRED PTS	GRD	R	SUBJ NO.	CMP	COURSE TITLE	CRED PTS	GRD	R	
Institution Information continued:						Institution Information continued:						
Fall Semester 2014						***** BEGIN UNDERGRADUATE-SEMESTER SYSTEM TOTALS *****						
CRIM 2272	A	Intro to Law Enforcement	3.00	A			Earned Hrs	GPA Hrs	Points	GPA		
			12.00			TOTAL INSTITUTION	122.00	122.00	429.00	3.51		
CRIM 3333	A	Victimology	3.00	B								
			9.00			TOTAL TRANSFER	0.00	0.00	0.00	0.00		
CRIM 4000	A	Research Methodology	3.00	A								
			12.00			OVERALL	122.00	122.00	429.00	3.51		
CRIM 4200	A	Violent Crime	3.00	B								
			9.00			REGENTS	122.00	122.00	429.00	3.51		
MATH 2063	A	Introductory Statistics	3.00	A								
			12.00			ACADEMIC STANDING	Good Standing					
Term: Ehrrs:	15.00	GPA-Hrs:	15.00	Pts:	54.00	***** END UNDERGRADUATE-SEMESTER SYSTEM TOTALS *****						
Dean's List	Good Standing					***** END OF TRANSCRIPT *****						
Spring Semester 2015												
CRIM 4003	NET	Statistics for Social Sciences	3.00	B								
			9.00									
CRIM 4279	NET	Race and Crime	3.00	A								
			12.00									
CRIM 4280	NET	The Criminal Mind	3.00	A								
			12.00									
CRIM 4712	NET	Law and Society	3.00	B								
			9.00									
CRIM 4911	NET	Terrorism	3.00	W								
			0.00									
PSYC 3900	NET	Personality Theories	4.00	B								
			12.00									
Term: Ehrrs:	16.00	GPA-Hrs:	16.00	Pts:	54.00	GPA: 3.37						
	Good Standing											
Summer Semester 2015												
CRIM 4230	NET	Ethics & Criminal Justice	3.00	A								
			12.00									
CRIM 4911	NET	Terrorism	3.00	B								
			9.00									
PSYC 3010	NET	Human Growth and Development	4.00	A								
			16.00									
Term: Ehrrs:	10.00	GPA-Hrs:	10.00	Pts:	37.00	GPA: 3.70						
	Good Standing											
Fall Semester 2015												
CRIM 3323	NET	Criminal Law	3.00	A								
			12.00									
CRIM 4284	NET	Senior Capstone	3.00	B								
			9.00									
PSYC 4030	NET	Hist & Philosoph of Psychology	4.00	B								
			12.00									
SOCI 1160	NET	Intro to Social Problems	3.00	B								
			9.00									
Term: Ehrrs:	13.00	GPA-Hrs:	13.00	Pts:	42.00	GPA: 3.23						
	Good Standing											

\*\*\*\*\* CONTINUED ON NEXT COLUMN \*\*\*\*\*

# University of West Georgia

University System of Georgia

Office of the Registrar  
Carrollton, GA 30118-0001

## NAME CHANGE

In June 1996, West Georgia College became the State University of West Georgia. In January 2005, the name was updated to the University of West Georgia.

## CALENDAR:

Effective Fall 1998, the University of West Georgia moved from a quarter calendar to a semester calendar.

## COURSE NUMBERING SYSTEM:

Before Fall 1998

0-99	-	Non-credit courses
100-299	-	Lower division courses
300-499	-	Upper division courses
600-999	-	Graduate courses

Fall 1998 – Present

0000-0099	-	Non-credit courses
1000-2999	-	Lower division courses
3000-4999	-	Upper division courses
5000-9999	-	Graduate courses

## OTHER GRADE SYMBOLS:

- # Institutional Academic Renewal grades of A, B, C and S count in hours earned, but not in GPA. Grades of D and F do not count in hours earned or GPA.
- > Transfer Academic Renewal grades of A, B, C and S count in attempted, earned and GPA. D grades count in GPA but not in hours earned.
- \* UWG College Preparatory Curriculum (CPC/RHSC) course. Counted in hours earned and GPA. Effective fall 2015, can be used to meet degree requirements.
- % Learning Support/Development Studies. Not counted in hours earned or GPA.
- [ ] No credit awarded; counts in transfer GPA.
- @ Transfer College Preparatory Curriculum (CPC/RHSC) course. Counted in hours earned and GPA. Effective fall 2015, can be used to meet degree requirements.
- ^ Two year college graduate previously suspended or dismissed from West Georgia. Student must earn an additional 60 semester hours with at least a 2.00 for a bachelor's degree.

## GRADING SYSTEM

Grade	Rating	Quality Points
A	Excellent	4
B	Good	3
C	Satisfactory	2
D	Passed	1
F	Failed	0
WF	Withdrew, failing	0
V or AU	Auditor	None
K	Credit by examination	None
S	Satisfactory	None
U	Unsatisfactory	None
W	Withdrew	None
CP or IP	Has not completed the course but is making satisfactory progress	None
I	Incomplete (was doing satisfactory work, but for non-academic reasons, has not completed course)	None
NR	Grade not reported	None
WM	Military withdrawal	None

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# HOWARD UNIVERSITY

SCHOOL OF LAW

June 14, 2023

Re: Letter of Recommendation: Mr. Stayce L. Evans

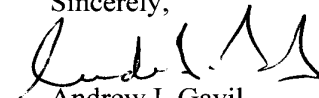
Dear Judge:

It is my pleasure to write in support of my student, Mr. Stayce L. Evans, who has applied to your chambers for a clerkship commencing January 2025. Mr. Evans is diligent, thoughtful, and continually striving to build his knowledge and legal skills. He welcomes intellectual challenges and, as you will see from his resume, cover letter, and hopefully a personal interview, he will embrace the opportunity to clerk with enthusiasm, bringing his excellent communication skills and past clerking experiences to your chambers. His interest in justice is deep and genuine.

Through two courses this past academic year, both of which are highly relevant to his interest in clerking, I had first-hand opportunities to observe Mr. Evans and assess his professional potential. In Federal Courts and the Supreme Court Jurisprudence seminar that I co-teach, Mr. Evans was intellectually curious and an active and engaged participant in class discussions. In the seminar, the students work collaboratively as a simulated "Supreme Court" to decide three cases pending during the current term. Each student then drafts an opinion resolving the issues in the case. Mr. Evans immersed himself in the legal issues and arguments of the parties and produced three well-written and thoughtful opinions. His reflective observations enriched the class.

Mr. Evans will be a committed and focused clerk, who will work well with others and continue to grow and excel as a professional. I commend him to you for consideration without any reservations. Please contact me at your convenience at either 202-806-8018 or [agavil@law.howard.edu](mailto:agavil@law.howard.edu) if I can be of any further assistance as you make your hiring decisions.

Sincerely,



Andrew I. Gavil  
Professor of Law



2900 Van Ness Street, NW  
Washington, DC 20008

(202) 806-8000  
Fax (202) 806-8428  
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June 12, 2023

Your Honor:

I write to enthusiastically recommend Stayce Evans for a clerkship position in your chambers. I previously served as a law clerk to the Honorable Reggie B. Walton of the U.S. District Court for the District of Columbia between July 2020 and July 2022. I supervised Stayce while he served as a judicial intern for Judge Walton. This recommendation derives solely from my personal impressions of Stayce that developed during our time working together and as a result of his wonderful efforts in chambers.

Stayce served as one of Judge Walton's judicial interns during the 2022 summer semester. Judge Walton's judicial interns have three essential tasks. One, they draft substantive opinions, orders, and legal memoranda for Judge Walton's law clerks. This substantive work is for real cases and often involves matters actively pending before the Judge. Second, they provide edit and bluebooking support for law clerks—a job that serves an essential role in chambers' work product review process. Third, they attend sessions of court, which allows them to familiarize themselves with how a federal judge runs his courtroom. In sum, the interns serve in much the same function as the law clerks, albeit with a much lighter case load and within a structured program. The interns are supervised with an eye toward mentorship and growth as future attorneys.

Stayce's performance in all areas was excellent. As Stayce's supervisor, I found that his work was high-quality and laudably thorough. For his primary substantive assignment, Stayce was tasked with analyzing a pending motion on Judge Walton's civil docket and producing an extensive draft memorandum opinion addressing that motion. Though the motion in question involved a complicated set of intertwined issues and factual complexities, Stayce excelled in tackling this task. Stayce showed incredible attention to detail and held significant ownership over his work. His written work product was direct, clear, and exceeded expectations. Moreover, Stayce's skills clearly grew with each additional project given to him as he readily incorporated critiques and suggestions from the law clerks.

Stayce also displayed professionalism and a strong work ethic that stood out from his fellow interns. Throughout the semester, Stayce would regularly seek meetings with me and the other clerks regarding his progress and performance.

During these meetings, Stayce demonstrated strong communication skills of a caliber that would serve well in any judge's chambers. Stayce also displayed a clear interest in public service and the dedication required for such work.

On a more personal note, Stayce is simply a wonderful person to be with in a work environment. He took the initiative to really get to know Judge Walton and his law clerks and was well-liked in chambers. As pandemic restrictions for interns in our courthouse eased, Stayce took frequent advantage of opportunities to engage with our team in-person in a health-conscious way. I have no reservations in predicting that Stayce has a bright future ahead of him and would excel in the responsibilities demanded of a judge's law clerk. I would be happy to discuss his qualifications for a clerkship in further detail and can be reached by phone at (540) 207-8049.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nathaniel K. Whitesel', with a stylized, sweeping flourish at the end.

Nathaniel K. Whitesel

HOWARD  
UNIVERSITY

SCHOOL OF LAW

June 12, 2023

Re: Letter of Recommendation for Stayce Evans

Dear Judge:

I write in strong support of Stayce Evans's application to serve as a law clerk in your chambers. I had the pleasure of working with Stayce as his legal writing professor during his 2L year. Based on Stayce's performance in class and because of his excellent interpersonal skills, I—along with the rest of the legal writing faculty—selected him as a Writing Center Dean's Fellow for the 2023-24 school year, where he will assist first-year law students with their writing assignments. Having served several years as a federal judicial law clerk myself, I believe Stayce has the intelligence, analytical skills, work ethic, and professionalism to be an outstanding law clerk.

As a student in my legal writing class, Stayce stood out as an eager and dedicated student. Stayce was always prepared for class and participated meaningfully and thoughtfully in class discussions. He grasped complex legal concepts quickly and demonstrated an ability to apply law to facts with ease. In addition to his strong performance in class, Stayce was a regular visitor to my office hours, and he worked hard to incorporate my feedback in his work. Indeed, his eagerness to learn and grow in his career was evident in every interaction we had. In these interactions, I found Stayce to be focused, smart, and a true pleasure to work with. His written work product was excellent.

Stayce's determination and ability will make him successful in whatever he chooses to pursue. I recommend him for a clerkship in your chambers without reservation. Should you have any questions, please feel free to reach out to me at [svanwye@law.howard.edu](mailto:svanwye@law.howard.edu).

Sincerely,

/s/ Sarah VanWye

Sarah VanWye  
Assistant Professor of Lawyering Skills



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**Stayce Evans**

Wheaton, MD

stayce.evans@law.bison.howard.edu, 404-492-2661

**WRITING SAMPLE**

The attached writing sample is an excerpt from an appellate brief I submitted for Legal Writing II, Appellate Advocacy. The fictitious case involved a Honduran citizen's appeal to the 7th Circuit of the lower court's decision to deny her application for asylum.

Ms. Berta Franco, a transgender woman, was a volunteer who connected transgender individuals with supportive health and education services. While accompanying her client to the Honduran National Police Station to file a report, Ms. Franco was sexually assaulted by one of the officers. Soon after the incident, Ms. Franco received threatening text messages. Then, one evening while leaving the office where she volunteered, she was again assaulted.

After her assaults, Ms. Franco fled Honduras and commenced an asylum action in the United States. The immigration judge who reviewed her asylum application denied it, and the Board of Immigration Appeals affirmed the denial. In opposition to Ms. Franco's asylum application, the Government maintained that there was no sufficient connection between Ms. Franco's transgender identity and the harm she experienced to amount to a well-founded fear of future persecution.

The questions presented were:

Under the Immigration and Nationality Act,

1. Does the threatened violence and assaults visited on Ms. Franco by the police amount to harms that rise to the level of persecution?
2. Does Ms. Franco have a well-founded fear of future persecution, based on her past harms and the fact that the Honduran government failed to adequately address the increase in physical violence and killings of transgender persons?
3. Was the persecution Ms. Franco experienced or her well-founded fear of future persecution on account of her transgender identity?

I represented the petitioner-appellant, Ms. Berta Franco. The excerpt that follows addresses the first two issues—Ms. Franco's past persecution and well-founded fear of future persecution. It is important to note that my Legal Writing Professor preferred if we did not cite to the record in our argument section.

### STATEMENT OF ISSUES

Under the Immigration and Nationality Act,

Does Ms. Franco's harm rise to the level of persecution, where she was violently threatened and assaulted soon after attempting to report a prior sexual assault by the police?

Does Ms. Franco have a well-founded fear of future persecution, based on her past harms and the fact that the Honduran government failed to adequately address the increase in physical violence and killings of transgender persons?

## STATEMENT OF THE CASE

Berta Franco, the petitioner, is a 23-year-old transgender woman and citizen of Honduras. R. at 6.<sup>1</sup> At birth, Ms. Franco was named Alberto Fernando by her parents, but around age 14 started going by the name Berta and publicly presenting her feminine identity. R. at 6–7. Ms. Franco is a noble Honduran citizen who volunteered with Chicas, an organization that connects transgender individuals with supportive health and education services. R. at 7. Ms. Franco takes pride in confidently expressing her transgender identity despite the negative attention and violence transgender people face in Honduras. Id.

While volunteering, Ms. Franco accompanied one of her clients to the Honduran National Police station to report that the client had been assaulted. Id. Immediately after the officers determined that Ms. Franco is a transgender woman, they stopped taking her seriously. Id. The officers began mocking Ms. Franco and one officer thrustled towards Ms. Franco with his crotch, asking “[i]sn’t this what you want[.]” Id. Ms. Franco slapped the officer and fled the station after other officers surrounded the two while reaching for their batons. Id.

A few days later, Ms. Franco received an anonymous text message that read “[b]e careful, Alberto, or we will give it to you good.” Id. Ms. Franco did not recognize the number but believed the sender to be the Honduran National Police. Id. Ms. Franco later attempted to follow up on the report of her client and file a complaint of her own about the officers’ treatment at the station but was placed on hold before the line was disconnected. Id.

The following day, Ms. Franco was assaulted and misgendered by three unknown men immediately after leaving the Chicas office. Id. One of the men yelled “[s]enor, you better watch out[, n]ext time we will get you” and threw a glass bottle at Ms. Franco’s head. R. at 8.

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<sup>1</sup> R at X denotes citation to the record on appeal.

Although Ms. Franco did not recognize the men, she felt terrified and made a statement to the police regarding the incident. Id. The officer took Ms. Franco's statement but admonished her for walking alone late at night. Id. Ms. Franco later learned that a close friend, who was also a transgender woman, was arrested, detained for a week, and beaten while in the custody of the Honduran National Police. Id. Two weeks after learning this information, Ms. Franco fled Honduras. Id.

Despite adding a hate crime amendment to the penal code, Honduras is known to have the highest murder rate of transgender people in the world. R. at 28, 60. Local media and human rights non-governmental organizations have reported an increase in killings of Honduran LGBTI persons in 2019. R. at 28. In a nine-month period there have been 16 hate crimes against transgender women and seven LGBTI persons killed within a two-month period. Id. In response, the Honduran government has investigated and released messages on social media condemning the violence. Id.

After fleeing Honduras, Ms. Franco arrived in the United States on April 5th, 2019. R. at 4, 6. She was apprehended by the Department of Homeland Security shortly after her arrival and placed in removal proceedings. R. at 4. On April 29, 2019, Ms. Franco filed an application for asylum relief. Id. The Immigration Judge held a hearing on Ms. Franco's application on July 16, 2021, which was subsequently denied on November 23, 2021. Id. The BIA affirmed the Immigration Judge's decision without opinion on February 13, 2022. R. at 3.

In denying Ms. Franco's asylum application, the Immigration Judge ruled that she did not meet the definition of a refugee. R. at 5. Further, the Immigration Judge held that Ms. Franco's harm did not rise to the level of persecution, nor did she have a well-founded fear of future

persecution and that the harm she experienced was not on account of her transgender identity.

Id.

### SUMMARY OF THE ARGUMENT

Ms. Franco has established that she has experienced past persecution and a well-founded fear of future persecution on account of membership in a particular social group, namely that of transgender identity. The threat of physical harm and being physically assaulted is indeed conduct that threatens both life and freedom thus meeting the definition of persecution. Nevertheless, the Immigration Judge ignored the evidence in the record establishing a pattern or practice of persecution against transgender and LGBTI persons in Honduras. The ample evidence that transgender persons were detained, assaulted, and killed is more than enough to establish a well-founded fear of future persecution. Lastly, based on the evidence in the record including Ms. Franco's persecution coupled with the persecution that transgender and LGBTI persons in Honduras experience generally, it is clear that such persecution is on account of Ms. Franco's transgender identity.

Because Ms. Franco's harm rises to the level of persecution, and she has established an objectively reasonable fear of future persecution, this Court should reverse and remand the BIA's ruling. This Circuit has defined persecution as "punishment or the infliction of harm for political, religious, or other reasons that [the United States] does not recognize as legitimate." Roman v. INS, 233 F.3d 1027, 1034 (7th Cir. 2000). The harm faced need not threaten life or freedom, but it must rise above the level of mere harassment. Id. Here, Ms. Franco's harm rises above mere harassment because after she attempted to report the sexual assault at the police station, anonymous perpetrators threatened and attempted to assault her. These actions all took place after the police determined that Ms. Franco was a transgender woman, demonstrating

punishment or infliction of harm for a reason that the United States does not recognize as legitimate.

To satisfy an objectively reasonable fear of future persecution, Ms. Franco must show that there is a pattern or practice of persecution of an identifiable group to which she belongs. Ayele v. Holder, 564 F.3d 862, 868 (7th Cir. 2009). This pattern or practice must be demonstrated by a “systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group.” Mitreva v. Gonzales, 417 F.3d 761, 765 (7th Cir. 2005). Also, the pattern or practice must be perpetrated or tolerated by state actors. Id. Here, the record shows that seven members of the LGBTI community, which Ms. Franco admittedly belongs, were killed in a two-month period and 16 hate crimes were reported over a nine-month period. Further, there has been no serious effort on behalf of the Honduran government to deter or address the violence that LGBTI persons face. Based on the facts in the record, Ms. Franco has established past persecution and a well-founded fear of future persecution on account of her transgender identity and thus the BIA’s ruling should be reversed.

### STANDARD OF REVIEW

Where, as is the case here, the BIA summarily adopts the Immigration Judge’s decision, this Court reviews the Immigration Judge’s factual findings and reasons as though they were the BIA’s. Mousa v. INS, 223 F.3d 425, 428 (7th Cir. 2000). Whether a person is a refugee is a factual determination that is reviewed under the substantial evidence standard. Urukov v. INS, 55 F.3d 222, 227 (7th Cir. 1995). The substantial evidence standard requires this Court to only uphold the BIA’s decision when it is “supported by reasonable, substantial, and probative evidence on the record considered as a whole.” Sivaainkaran v. INS, 972 F.2d 161, 163 (7th Cir. 1992) (citing 8 U.S.C. § 1105(a)(4)). Where the evidence “compel[s] a contrary conclusion” to

the BIA's decision, this Court should reverse and remand. Hernandez-Jimenez v. Sessions, 710 F. App'x 257, 259 (7th Cir. 2018).

## ARGUMENT

### **I. This Court should reverse and remand the BIA's ruling because it is not supported by substantial evidence as Ms. Franco has established past persecution and a well-founded fear of future persecution.**

Asylum relief is available where the petitioner satisfies the definition of refugee. 8 U.S.C. § 1158(b)(1)(A); see also Ndonyi v. Mukasey, 541 F.3d 702, 711 (7th Cir. 2008) ("An asylum applicant can prove her claim through circumstantial evidence"). A refugee is defined as someone who is unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Therefore, the petitioner may qualify for asylum by showing either past persecution or a well-founded fear of future persecution. Begzatowski v. INS, 278 F.3d 665, 669 (7th Cir. 2002). Where the petitioner establishes past persecution or a well-founded fear of future persecution, she must then establish that such persecution was on account of her transgender identity. 8 U.S.C. § 1101(a)(42)(A). This Court should reverse and remand the BIA's ruling because Ms. Franco has demonstrated past persecution and a well-founded fear of future persecution.

#### **A. Ms. Franco's harm rises to the level of persecution because she received physical threats and was physically assaulted which is conduct that rises above mere harassment and threatens freedom or life.**

This Court should reverse and remand the lower court's ruling that Ms. Franco's harm did not rise to the level of persecution because Ms. Franco has presented evidence that the harm she experienced threatened freedom and life. Although the statute does not provide a definition of persecution, this Court has described persecution as "punishment or the infliction of harm for

political, religious, or other reasons that [the United States] does not recognize as legitimate.”

Roman, 233 F.3d at 1034. The harm faced by the petitioner does not need to threaten life or freedom, but it must rise above mere harassment. Id.; Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000) (“[N]on-life threatening violence and physical abuse also fall within this category.”). This Court has defined harassment as the targeting of members of a specific group for adverse treatment but without physical force. Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) (providing an example that a police officer following a taxi driver and ticketing them whenever they exceed the speed limit by one mile per hour would be harassment).

Actions rise above mere harassment where the perpetrators attempt to follow through on their threats. Roman, 233 F.3d at 1035. In Roman, the applicant’s tires were punctured, and he received an anonymous phone call warning him that if he did not “shut up,” he would have more serious problems. Id. at 1030. The BIA’s decision that the petitioner did not suffer past persecution was upheld because the petitioner did not come forward with any evidence that the “government orchestrated, or at least sanctioned” the harm he experienced. Id. at 1035. However, this Court found that these threats surpassed mere harassment because the perpetrators attempted to follow through on the threats when they slashed the applicant’s tires. Id.

Similarly, here, Ms. Franco’s harm rises above the level of mere harassment because the perpetrators attempted to follow through on their threats when they followed Ms. Franco and threw a glass bottle at her head. Additionally, the assailants also yelled to Ms. Franco “[s]enor, you better watch out[, n]ext time we will get you.” This language coupled with the bottle throwing is like the incidents in Roman where the petitioner’s tires were slashed, and he was told that if he did not “shut up” he would have more serious problems. Although the language

directed at Ms. Franco is not a direct match, it comes with the same message that something worse could happen in the future.

Ms. Franco has presented evidence showing that the “government orchestrated, or at least sanctioned,” the threats or assault against her. Roman, 233 F.3d at 1035. Here, unlike Roman, where the petitioner was unable to make a connection between the government and the harm experienced, Ms. Franco can. Ms. Franco’s harm began shortly after fleeing from the police department where she was sexually assaulted by one of the officers who tried to flip up her skirt. This is unlikely a simple coincidence because Ms. Franco attempted to report the police mistreatment but was placed on hold before the line was disconnected. This indicates that the Honduran National Police were not interested in taking Ms. Franco’s report of mistreatment. Further, the short lapse of time between the sexual assault at the police station and the threats show a connection between these incidents and the police. Lastly, after Ms. Franco was assaulted on the street, she reported the attack to police who did nothing more than admonish her. Therefore, the Honduran National Police “orchestrated, or at least sanctioned” the conduct because Ms. Franco attempted to bring the incidents to their attention, to no avail.

Conditions rise to the level of persecution where a protected social group is singled out for political violence or other dangerous conditions that are life threatening. Begzatowski, 278 F.3d at 670. In Begzatowski, the evidence showed that the applicant’s social group was segregated and physically abused as a way of punishment or infliction of harm. Id. For example, the applicant’s social group of Albanian soldiers were physically assaulted by military leadership and used as human shields while Serbian soldiers were left alone. Id. at 667. This Court found these actions to rise above mere harassment and constitute persecution because these actions singled out a specific group. Id. at 670.